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NLRB Deferral to Grievance-Arbitration: A General Theory

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I. THE PROBLEM OF DEFERRAL

A. *Introduction*

This Article addresses the problem of when the National Labor Relations Board (NLRB or Board) should refrain from resolving unfair labor practice charges that have been or could be resolved by contractual grievance and arbitration procedures. Refraining, known as deferral, may be appropriate either before or after contractual procedures have been used.[1] This Article articulates a general theory of deferral that is essentially consistent with Board jurisprudence and, more importantly, with congressional intent and national labor policy. It answers a number of arguments criticizing Board deferral and also supplies much needed clarity to the Board's evolving deferral policy. The Article places emphasis upon two recently decided cases, *United Technologies Corp.*[2] and *Olin Corp.*,[3] and their progeny. Finally, the Article makes two recommendations that would immediately advance NLRB deferral policy.

For fifty-two years the Board has enforced a statute whose purpose is to give employees the right to determine how best to protect their interests.[4] The provisions of the statute are designed to bring the parties to the bargaining table—union representatives on behalf of employees and management representatives on behalf of the employer.[5] Once there, the parties bilaterally determine the employment rights and responsibilities that will govern their relationship. The protections for individual employees included in the resulting employment contracts are typically broader than those contained in the National Labor Relations Act (NLRA or Act).[6] The statutory

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1. In this Article restraint in the former context will be referred to as pre-settlement deferral and in the latter context as post-settlement deferral.

2. 268 N.L.R.B. 557 (1984).

3. 268 N.L.R.B. 573 (1984).

4. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1982).

5. *Id.*

6. *See infra* notes 70–72 and accompanying text.

provisions protecting individuals are primarily limited to insuring employees the right to act in concert and the right to determine the question of union representation in a noncoercive atmosphere.[7] Predictably, the Board's major role under the Act is to protect the rights of employees to decide the issue of union representation.[8] Once that decision has been made, the Board retains only the secondary role of protecting the collective system that the parties have instituted.[9]

The implications of this statutory design for deferral cases are subtle. Deferral cases arise only after the parties have inaugurated a collective bargaining relationship under which those covered by the agreement enjoy a panoply of rights and responsibilities.[10] At this phase of the parties' relationship, the Board's primary task of protecting the right of employees to decide the issue of representation has been accomplished. All unfair labor practice charges that arose during the course of the union campaign, including alleged unlawful coercion and discrimination against individual union activists or opponents, have been disposed of.[11] The Board has also decided questions concerning union representation itself by conducting an election and resolving ancillary questions arising before or after the election.[12] Finally, it has enforced the procedural and substantive obligation to bargain in good faith.[13] At this point, the major purpose of collective bargaining is to protect employees and preserve industrial peace. When collective bargaining is capable of resolving disputes that have statutory ramifications, the Board is concerned only about conduct of the parties that may threaten the employees' representation decision, the resulting collective bargaining process, or its own effectiveness as an enforcing agency.[14] Deferral in these instances is inapproriate either when the grievance-arbitration procedures created by the parties cannot handle the dispute or when the alleged conduct or award threatens the representation decision, the collective bargaining process, or the Board's enforcement authority. In cases not involving these special concerns, Board deferral permits collective bargaining to perform the role intended by Congress.

With only two statutory guidelines—the NLRB's enforcement mandate and the preference for private adjustment provisions—the Board has steered a course that is generally faithful to the statutory design and that also supports this general theory of deferral.[15] Essentially, the Board has deferred when grievance-arbitration procedures *could* fairly resolve the unfair labor practice aspects of the dispute[16] and has exercised

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7. Section 7 of the Act provides as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1982).

8. *See infra* notes 25–55 and accompanying text.
9. *See infra* notes 188–206 and accompanying text.
10. *See infra* notes 74–81 and accompanying text.
11. *See infra* notes 52–54 and accompanying text.
12. *See infra* notes 50–55 and accompanying text.
13. *See infra* notes 31–45 and accompanying text.
14. *See infra* notes 188–206 and accompanying text.
15. *See infra* notes 82–147 and accompanying text.
16. The major exception was the Board's decision in General Am. Transp., 228 N.L.R.B. 808 (1977).

jurisdiction when conduct by one or more parties threatened the employees' freedom of choice or the collective bargaining process itself.[17] The Board has exercised its enforcement capability and has heard unfair labor practice complaints when the parties' grievance procedures could not resolve the dispute.[18] While occasionally veering off course, the Board's policy announcements in *United Technologies* and *Olin Corp.* and subsequent decisions have evidenced a new clarity of direction. This lucidity is threatened only by the Board's apparent failure to fully appreciate the need for a general theory of deferral.

A general theory would help the Board distinguish between cases implicating its central focus and those requiring only supervision. With this understanding, the Board would no longer misapply its deferral standards.[19] In addition, under a general theory, pre-settlement and post-settlement cases would not present different problems. Rather, they would present one problem, resolved by a uniform set of standards.[20] This uniform application of deferral standards would lead to greater consistency in deferral decisions. Finally, a general theory would help the Board appreciate the importance of carefully scrutinizing the results of the grievance-arbitration process.[21] Although current pre-settlement and post-settlement deferral standards acknowledge the fair representation inquiry, the Board has given disturbing signs that it does not recognize the importance of the fair representation test for deferral.[22] Incorporating a "reasonable care" standard of representation into the fairness standard of review under *Spielberg Manufacturing Co.*[23] and *Olin* would fortify the Board's progressive deferral policy against claims of abdication and seal the connection between collective bargaining and Board deferral under our national labor policy.[24]

B. *NLRB and Contractual Grievance Procedures: A "Thumbnail" Sketch*

1. *Board Procedures*[25]

The National Labor Relations Act was enacted in 1935[26] with major amendments in 1947[27] and 1959.[28] Its purpose is to encourage collective bargaining, while protecting the freedom of employees to decide the issue of representation.[29] The

17. *See infra* notes 307–61 and accompanying text.
18. *See id.*
19. *See infra* notes 362–76 and accompanying text.
20. *See infra* notes 377–95 and accompanying text.
21. *See infra* notes 396–429 and accompanying text.
22. *See infra* notes 400–05 and accompanying text.
23. 112 N.L.R.B. 1080 (1955).
24. *See infra* notes 406–29 and accompanying text.
25. *See generally* T. KAMMHOLZ & S. STRAUSS, PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD (3d ed. 1980); F. MCCULLOCH & T. BORNSTEIN, THE NATIONAL LABOR RELATIONS BOARD (1974); K. MCGUINESS & J. NORRIS, HOW TO TAKE A CASE BEFORE THE NLRB (5th ed. 1986).
26. National Labor Relations (Wagner) Act, Pub. L. No. 74–198, 49 Stat. 449 (1935).
27. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80–101, 61 Stat. 136 (1947).
28. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86–257, 73 Stat. 519 (1959). The health care amendments were added in 1974. Pub. L. No. 93–360, 88 Stat. 395.
29. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1982).

substantive rules of the Act further this objective by making certain types of employer and union conduct unfair labor practices.[30]

The Act, as amended, is enforced by the National Labor Relations Board, the administrative agency charged with preventing and remedying unfair labor practices[31] and with deciding questions of representation.[32] These two functions of the Board are performed by a five-member quasi-judicial body that adjudicates unfair labor practice and representation cases, and a General Counsel who investigates and prosecutes unfair labor practice charges.[33] The duties of the Board and General Counsel are delegated to regional directors, who manage thirty-three regional offices throughout the country.[34] Regional staffs of field examiners and field attorneys investigate charges, prosecute unfair labor practice cases, conduct elections, hold representation hearings, and write representation decisions.[35]

Unfair labor practice cases are initiated when an employee, union, or employer files a charge claiming that an employer or union has committed an unfair labor practice.[36] Field examiners and attorneys investigate such charges, and the regional director decides whether they have merit.[37]

If a charge has merit, the regional director, as the General Counsel's designee, issues a complaint.[38] If the case is not settled,[39] a field attorney tries the case before an administrative law judge (ALJ).[40] While charging parties are permitted to participate in unfair labor practice trials and may be represented by counsel, such

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30. Section 8 provides as follows:

(a) It shall be an unfair labor practice for an employer— (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter; (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents— (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title; . . . .

29 U.S.C. § 158 (1982).

31. *See* 29 U.S.C. § 160(a) (1982).

32. *See* 29 U.S.C. § 159 (1982).

33. *See* 29 U.S.C. § 153(a), (d) (1982).

34. Telephone interview with Warren Bellamy, Compliance Officer for Region 8 of the NLRB, Cleveland, Ohio (January 8, 1987).

35. *See* 29 U.S.C. § 153(b) (1982).

36. *See* 48 NLRB ANN. REP. 5 (1983).

37. *See id.* at 5–6.

38. *See* 29 C.F.R. § 102.15 (1986).

39. In 1983, the most recent year for which Board statistics are available, approximately 85% of the unfair labor practice cases deemed by the regional director to have merit were formally or informally settled at the regional office level. 48 NLRB ANN. REP. 7 (1983).

40. *See* 29 C.F.R. §§ 102.15, 102.34–.35 (1986).

trials are prosecuted and fully controlled by the field attorney. Respondents are, of course, accorded full due process rights.[41]

If the ALJ's decision is not appealed to the NLRB, the NLRB will automatically adopt the ALJ's decision.[42] If the ALJ's decision is appealed, a panel of three Board members will affirm, reverse, or modify the ALJ's decision,[43] unless the importance of the issue requires review by the entire five-member Board.[44] The NLRB's decision must be enforced by a federal circuit court of appeals at the request of the Board and may be reviewed pursuant to the petition of any "person aggrieved."[45] The circuit court's decision is appealable to the United States Supreme Court.

If a charge does not have merit, it is either withdrawn by the charging party or dismissed by the regional director.[46] Such dismissal decisions may be appealed only to the Office of the General Counsel in Washington, D.C.[47] where they are virtually always affirmed.[48] The General Counsel's dismissal decision may not be appealed.[49]

Representation cases also begin at the regional office level. Petitions are filed by unions, employees, and employers claiming that a question of representation exists.[50] Field attorneys and examiners investigate such petitions and the regional director secures the agreement of the parties regarding jurisdictional or voter eligibility issues. The regional director may also conduct a hearing on contested election issues and direct an election if he finds that a question of representation exists.[51] Regional staff may also conduct the elections and investigate post-election charges of objectionable conduct.[52] If the regional director finds that coercive or other conduct has affected the election process, he will set aside the election and order a new one. Otherwise, the election results stand. Because unfair labor practices often occur during organizational campaigns, objections arising in representation cases and unfair labor practice issues may be consolidated for trial.[53] Regional director decisions in election cases are reviewable by the NLRB.[54] In the interest of expeditiously resolving representation questions, the Board's decisions in representation cases are not directly appealable to circuit courts of appeals. Rather, these decisions may only be reviewed on appeal in the context of unfair labor practice cases.[55]

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41. *See* 29 C.F.R. § 102.38 (1986).
42. *See* 29 U.S.C. § 160(c) (1982); 29 C.F.R. § 102.48 (1986).
43. *See* 29 C.F.R. § 102.45–.48 (1986).
44. *See* 29 U.S.C. § 153(b) (1982).
45. 29 U.S.C. § 160(e)–(f) (1982).
46. *See* 48 NLRB ANN. REP. 5–6 (1983).
47. 29 C.F.R. § 102.19 (1986).
48. *See* NLRB General Counsel's Summary of Operations for Fiscal Year 1984, 1984 Labor Relations Yearbook (BNA) 326.
49. The decision of the General Counsel may, however, be reconsidered. *See* 29 C.F.R. § 102.19 (1986).
50. *See* 29 U.S.C. § 159(c)(1) (1982).
51. *See* 29 U.S.C. § 159(b), (c) (1982); 29 C.F.R. §§ 102.60, 102.62–.64 (1986).
52. *See* 29 C.F.R. § 102.69 (1986).
53. *See* J. FEERICK, H. BAER & J. ARFA, NLRB REPRESENTATION ELECTIONS—LAW, PRACTICE & PROCEDURE, § 10.4 (1979).
54. *See* 29 C.F.R. § 102.69 (1986).
55. *See* 29 U.S.C. §§ 159(d), 160(f) (1982); *but see* Leedom v. Kyne, 358 U.S. 184 (1958).

2. *Contractual Grievance Procedures*

Virtually all collective bargaining agreements contain a procedure for resolving disputes arising under the agreement.[56] Most grievance provisions are drafted in broad terms, covering virtually all disputes that arise during the term of the agreement.[57] Generally, this grievance procedure permits a complaining employee or the union to initiate a grievance with an immediate supervisor, often the person implicated in the complaint.[58] If the grievance is not settled at this first stage, the grievant may attempt to settle at progressively higher levels of management within prescribed time periods.[59] If the parties cannot settle the grievance at one of these higher steps, most agreements call for submission of the dispute to arbitration.[60] A party who improperly resists an arbitration request may be compelled to arbitrate in a breach of contract action.[61] Arbitration hearings are less formal than court proceedings but do follow conventional trial procedures.[62] The contractual agreements provide the decisional rules, and both parties have the right to present relevant evidence and cross-examine witnesses.[63] The parties often file post-hearing briefs that are used by the arbitrator in rendering an award.[64] The arbitrator's award typically frames the issues, cites relevant contractual provisions, sets forth the factual background of the case and the contentions of the parties, and discusses the arbitrator's reasoning and conclusions.[65]

Arbitrators are contractual creatures; their authority and awards are limited by the contract.[66] Arbitration awards may only be enforced in a subsequent breach of contract court action and not by the NLRB.[67] While the Board may construe collective bargaining agreements to determine whether unfair labor practices have been committed, it has no jurisdiction to hear ordinary breach of contract cases.[68] Courts also exercise a narrow scope of review of arbitral awards, generally enforcing them unless: (1) the arbitrator has exceeded contractual authority; (2) the award is

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56. *See* 2 Collective Bargaining Negot. & Cont. (BNA) 51:1 (1987) [hereinafter CBNC].

57. *See id.*

58. *See id.* 51:2.

59. *See id.* 51:1.

60. *See id.* 51:5. *See also* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, 165–66 (4th ed. 1985).

Typically, the arbitrator is a single professional, not aligned with either party, and is selected by the parties from a panel maintained by the American Arbitration Association or the Federal Mediation and Conciliation Service. *See* F. ELKOURI & E. ELKOURI, *supra*, at 135–37. A noteworthy exception to this rule is the Teamsters Joint Committee, which consists of an equal number of management and union representatives and no neutral party. *See* Miller, *Teamster Joint Committees: The Legal Equivalent of Arbitration*, 37 PROC. OF NAT'L ACAD. ARB. 118 (1984); Summers, *Teamsters Joint Grievance Committees: Grievance Disposal Without Adjudication*, 37 NAT'L ACAD. ARB. 130, 133–35 (1984).

61. Section 301 of the Taft-Hartley Act provides for a federal breach of contract action to be brought in federal district court. 29 U.S.C. § 185 (1982). *See also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Similar actions may be brought in state courts, but federal law must be applied. Charles Dowd Box v. Courtney, 368 U.S. 502 (1962).

62. *See* F. ELKOURI & E. ELKOURI, *supra* note 60, at 258–69; Haughton, *Running the Hearing*, in ARBITRATION IN PRACTICE 37, 39 (A. Zack ed. 1984) [hereinafter ZACK].

63. *See* AMERICAN ARBITRATION ASSOCIATION: VOLUNTARY LABOR ARBITRATION RULES ¶ 28 (1965); Jones, *Selected Problems of Procedure and Evidence*, in ZACK, *supra* note 62, at 48.

64. *See* F. ELKOURI & E. ELKOURI, *supra* note 60, at 273–76.

65. *See, e.g.*, Kenner Products, 79 Lab. Arb. (BNA) 572 (1982) (Abrams, Arb.).

66. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

67. *See* NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).

68. *See id.*

tainted by some fundamental defect, such as fraud; or (3) the award violates the law or public policy.[69]

Collective bargaining agreements typically create a range of rights and obligations relating to compensation, direction of the enterprise, hours of work, leave, and the allocation of employment opportunities.[70] Importantly, they also provide for fair treatment in the workplace.[71] Generally, all of these issues are subject to the grievance procedure.[72] For example, an employee's complaint about a specific form of unfairness proscribed by the Act, such as a demotion because of protected union activity, could well be adjudicated under the grievance procedure as a demotion without "just cause."

This comparative sketch of Board and contractual dispute settlement procedures serves two purposes. First, it provides some basis for comparing outcomes when cases are decided under each system. For example, in an arbitration hearing, like a Board hearing, both parties will present evidence that will be scrutinized through cross-examination. Thus, if the same issue were before both tribunals, there is a substantial probability that the results would be similar. Second, it provides a general reference for later discussions about the statutory implications of Board deferral to contractual procedures and settlements.[73]

C. *Deferral Jurisprudence*

1. *How the Deferral Issue Arises*

The NLRA empowers the Board "to prevent any person from engaging in any unfair labor practice" and specifically provides that "[t]his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."[74] A 1947 amendment to the Act, however, gives preference to contractual procedures in the following terms: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."[75]

When a party charges that an employer or union has engaged in conduct that both constitutes an unfair labor practice and is resolvable under a contractual grievance procedure, a deferral issue is presented. The deferral decision is initially made by the General Counsel. If the General Counsel decides to issue a complaint notwithstanding a respondent's claim that grievance procedures or a settlement

69. *See* W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers, 461 U.S. 757 (1983). *See generally* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137, 1150–60 (1977).

70. *See* CBNC, *supra* note 56, at 36–95.

71. *See id.* 51:1.

72. *See id.* 51:5.

73. *See infra* notes 82–147 and accompanying text.

74. 29 U.S.C. § 160(a) (1982).

75. Labor Management Relations (Taft-Hartley) Act § 203(d), 29 U.S.C. § 173(d) (1982).

should receive deference, the General Counsel may bear the burden of proving before an ALJ and the Board that deferral is inappropriate.

A charge raising a deferral issue is generally filed in one of two contexts: (1) after the grievance procedure has produced a settlement; or (2) before the parties have achieved a settlement through the grievance procedure.[76] In the post-settlement context the charging party files a charge in spite of the settlement produced by the grievance procedure, usually an arbitral award. In the pre-settlement context the charging party may have completely bypassed the grievance procedure or may have simultaneously processed a grievance and filed a charge with the NLRB. Pre-settlement deferral in the latter instance, when the parties concurrently process a grievance and an unfair labor practice charge, has been relatively uncontroversial. In *Dubo Manufacturing Corp.*,[77] the Board decided that the purpose of the Act would be effectuated if it deferred action on the complaint pending the completion of arbitration. In that case, the union filed charges in part protesting the discharge of a number of employees in violation of subsection 8(a)(3) of the Act. One week later, the union successfully sued the employer in federal district court to compel arbitration of the grievances. The Board subsequently held that the statutory preference for contractual adjustment procedures made deferral appropriate. The Board noted that arbitration was being utilized by the parties and was capable of settling the dispute.[78] Under the *Dubo* rationale, therefore, the Board regularly defers to a concurrent grievance process.

Yet, the issues that have sparked the most concern involve the scope of NLRB deferral when a party either files a charge despite the settlement produced by grievance procedures[79] or bypasses these procedures altogether.[80] For more than four decades, the Board has grappled with the problem of how to reconcile its enforcement jurisdiction with the statutory preference for contractual adjustment procedures.[81]

2. *Key Cases*

a. *Post-Settlement Deferral*

The evolution of the Board's deferral policy in post-settlement cases [82]may best be described by reference to the following paradigmatic fact pattern.[83] Assume that a company and union enter a contract that prevents discharge without "just cause"

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76. This Article does not address the question of deference in the rare case in which the parties use some method other than arbitration (*e.g.*, the courts) as the ultimate step in the grievance procedure. Such a procedure may raise concerns different from those supporting deferral to grievance arbitration. *See* St. Antoine, *supra* note 69, at 1141–42.

77. 142 N.L.R.B. 431 (1963).

78. *Id.* at 432.

79. This type of case will be referred to as a "post-settlement" case.

80. Hereinafter, the term "pre-settlement" will refer only to cases in which the grievance procedure is unused and will not refer to cases such as *Dubo* in which the procedures are in progress.

81. *See* Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943).

82. Most post-settlement cases involve an arbitration award and frequently the more narrow "post-arbitral" or "post-award" reference is used. Yet the broader reference to "settlements" more accurately reflects the Board's practice of treating awards and non-arbitral settlements identically. *See infra* text accompanying note 357.

83. Hereinafter referred to as the "poor work performance" example.

and provides for binding arbitration at the request of either party as the ultimate step in the grievance procedure. Assume further that an employee is discharged, allegedly for poor work performance. The case is brought to arbitration where the employee claims that her work performance has been satisfactory and her discharge was without just cause and presents supporting evidence. She does not, however, raise a claim concerning her union activity. The employer presents unrebutted evidence showing a noncoercive, nonhostile union environment and the consistent treatment of poor work performance cases. Without mentioning a possible unfair labor practice, the arbitrator finds the discharge was for poor work performance and denies the grievance. The disappointed employee then files an unfair labor practice charge against the employer claiming the discharge was in retaliation for filing grievances—a statutorily protected activity.[84]

Board resolution of this and similar cases has historically been inconsistent. In 1955, the Board decided in *Spielberg Manufacturing Co.*[85] that it would defer to arbitration awards if "the proceedings appear[ed] to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel [was] not clearly repugnant to the purposes and policies of the Act."[86] The Board believed that such deference would further "the desirable objective of encouraging the voluntary settlement of labor disputes."[87] Since this repugnancy standard did not require the arbitrator to decide the issue as the Board would have, arbitrators were expected to perform their traditional contractual function rather than act as administrative law judges. In *International Harvester Co.*,[88] the Board announced that arbitral awards were repugnant only if "palpably wrong."[89]

Yet *Spielberg*'s "clearly repugnant" standard proved to be inherently imprecise and led to deferral when the arbitral award did not contravene clearly articulated Board law.[90] On the other hand, the Board did not defer in cases in which the arbitrator arguably relied upon an impermissible ground[91] or reached a result contrary to Board precedent.[92] The Board also encountered judicial opposition to its application of the "clearly repugnant" standard.[93]

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84. *See* United States Postal Serv., 256 N.L.R.B. 736 (1981); Hamilton Die Cast Co., 254 N.L.R.B. 949 (1981); 29 U.S.C. § 158(a)(4) (1982). For text of statute, see *supra* note 30.

85. 112 N.L.R.B. 1080 (1955) (involving a charge of discriminatory failure to reinstate four striking employees pursuant to a strike settlement agreement).

86. *Id.* at 1082.

87. *Id.* The apparent presumption was that if the award were inconsistent with the Act, it would also be inconsistent with the results statutorily anticipated from the collective bargaining process.

88. 138 N.L.R.B. 923 (1962) (involving a company's refusal to discharge an employee who had failed to pay union dues as required in the collective bargaining agreement).

89. *Id.* at 929.

90. *See* International Harvester Co., 138 N.L.R.B. 923 (1962).

91. *See, e.g.*, Douglas Aircraft Co., 234 N.L.R.B. 578 (1978).

92. *See, e.g.*, Professional Porter & Window Cleaning Co., 263 N.L.R.B. 136 (1982).

93. *See, e.g.*, Douglas Aircraft Co. v. NLRB, 609 F.2d 352, 354 (9th Cir. 1979) (deference to the original decision should often be accorded since "[i]f the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was 'clearly repugnant' to the Act"); NLRB v. Pincus Bros., 620 F.2d 367, 374 (3d Cir. 1980) (adopting the language of *Douglas Aircraft* and stating that in such a situation, upholding an award "may arguably be characterized as not inconsistent with Board policy.").

Under *Spielberg*, the Board would defer in the "poor work performance" hypothetical. There is no evidence that the grievant was denied basic due process rights or suffered other unfairness in the arbitration proceeding. Furthermore, the parties had contractually agreed to be bound by the arbitration award, and the Act does not frown upon employee discipline for legitimate business reasons.[94]

Six years after *Spielberg*, in *Monsanto Chemical Co.*,[95] and two years later in *Raytheon Co.*,[96] the Board altered the standard enunciated in *Spielberg*. These cases asserted that deferral to an arbitration award is improper when the arbitrator has not considered the unfair labor practice issue. In *Monsanto*, the arbitrator explicitly refused to consider whether the employee's union activity played any part in his discharge. The Board refused to defer to the award saying:

> It manifestly could not encourage the voluntary settlement of disputes or effectuate the policies and purposes of the Act to give binding effect in an unfair labor practice proceeding to an arbitration award which does not purport to resolve the unfair labor practice issue which was before the arbitrator and which is the very issue the Board is called upon to decide in the proceeding before it.[97]

The Board reached the same result in *Raytheon*, a case in which the parties specifically limited the arbitrator to the contractual issue and presented evidence only on that issue and not on the unfair labor practice issue.[98]

In the "poor work performance" example, the evidence suggests that the arbitrator did not consider whether the employee was discharged because of her union activity. The employee did not raise a claim in arbitration concerning her union activity. Although the employer presented evidence of a union-neutral environment, the arbitrator denied the grievance based on poor work performance without mentioning a possible unfair labor practice. Since the *Raytheon-Monsanto* requirement that the arbitrator consider the unfair labor practice issue has not been established, the Board would not defer to the arbitration award and the employee would secure a Board hearing.

After requiring that the arbitrator consider the unfair labor practice issue, from 1972 to 1984 the Board was unable to decide the extent of arbitral consideration that should be devoted to the unfair labor practice issue in post-settlement deferral decisions. This twelve-year period featured broad swings between strict requirements that made deferral difficult to lenient requirements that greatly facilitated deferral. In

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94. *See* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

95. 130 N.L.R.B. 1097 (1961).

96. 140 N.L.R.B. 883 (1963).

97. 130 N.L.R.B. 1097, 1099 (1961).

98. In *Raytheon* the Board implicitly adopted the test that it would make explicit 21 years later in *Olin*. *See infra* notes 108–11. The Board disagreed about whether the arbitrator had been presented with the same legal issues and the same facts that the Board had been asked to consider. Raytheon Co., 140 N.L.R.B. 883, 886 (1963). The majority rejected the dissent's argument that the contractual and statutory issues were parallel and evidence relevant to the unfair labor practice issue had been presented to and considered by the arbitrator. On this question the majority distinguished International Harvester Co., 138 N.L.R.B. 923 (1962), in which the arbitrator had considered the same legal issues and the same facts as the Board and reached a result that was not palpably wrong, on the basis that the employer had violated the contract by not discharging an employee pursuant to a valid union security agreement. Raytheon Co., 140 N.L.R.B. 883, 886 (1963).

its *Airco Industrial Gases* decision[99] the Board extended the *Raytheon-Monsanto* requirement by holding that the arbitrator must consider the unfair labor practice claim and that the arbitrator's *award* must reflect such consideration.[100] Furthermore, in *Yourga Trucking Inc.*,[101] the Board assigned the burden of proving the scope of arbitral consideration to the party seeking deferral. As a result, the *Airco* and *Yourga Trucking* requirements combined to make deferral more difficult. For instance, the employer seeking deferral in the "poor work performance" example cannot show that the unfair labor practice was explicitly considered by the arbitrator, since the award is silent on the issue. The employee would thus receive a trial de novo before an ALJ.

In *Electronic Reproduction Service Corp.*,[102] however, the Board moved to the opposite extreme, virtually abandoning any oversight of the arbitration process. In that case, the union withheld from the arbitrator evidence of unlawful employer motivation in the lay off of two employees. The Board was concerned that such conduct would encourage multiple litigation of the same issue and would frustrate the contractual dispute settlement process. Adopting the rationale of the dissenting opinions in *Airco* and *Yourga Trucking*, the Board held that in discipline and discharge cases it would defer to an arbitrator's award, even if no evidence of the unfair labor practice issue had been presented, except where unusual circumstances are shown.[103] The Board felt that a resisting party should be required to use contractual grievance procedures in discipline and discharge cases. *Electronic Reproduction* also shifted the burden of proof to the party seeking to have the Board exercise jurisdiction. In the "poor work performance" hypothetical, therefore, the grievant's failure to raise and support the unfair labor practice claim would not bar deferral since the General Counsel would be unable to prove unusual circumstances.

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99. 195 N.L.R.B. 676 (1972).

100. In *Airco*, the employee alleged a discriminatory discharge based on his grievance-filing activity. The arbitrator had been presented with the stipulated issue of whether the employee's discharge violated a collective bargaining agreement that contained a "just cause" provision and also prevented union-based discrimination. The evidence before the arbitrator included the agreement, testimony relating to whether the employee's supervisor was "out to get" him, and the results of a grievance filed by the employee the year before the hearing. The Board held that deferral was improper because the "award gave no indication that the arbitrator ruled on the unfair labor practice issue." *Id.* at 677. The Board distinguished Local 1522, Int'l Bhd. of Elec. Workers (Western Elec. Co.), 180 N.L.R.B. 131 (1969), in which the arbitrator had considered the unfair labor practice issue but did not have all the available evidence. Airco Indus. Gases, 195 N.L.R.B. 676, 676 n.3 (1972). Thus, *Airco* established that the factual record at arbitration need not be as complete as the Board's record in order to warrant deferral. This refinement of *Raytheon* survives in the *Olin* requirement that the arbitrator be presented generally with the facts relevant to deciding the unfair labor practice issue. *See infra* notes 108–11 and accompanying text.

The *Airco* extension, however, is inconsistent with a deferral policy favoring collective bargaining. The Board could have refused deferral on the basis that the arbitrator had not been presented with enough evidence relating to the unfair labor practice to properly resolve that aspect of the dispute.

101. 197 N.L.R.B. 928 (1972).

102. 213 N.L.R.B. 758 (1974).

103. *Id.* at 761–62.Examples of unusual circumstances are an arbitrator's expressed refusal to consider the unfair labor practice issue or the parties' stipulation that the unfair labor practice issue should not be considered. *Id.* at 761, 762 & n.18.

The holding in *Electronic Reproduction* is tantamount to saying that the Board will not worry about whether the unfair labor practice aspect of the dispute was decided, provided the parties had the *opportunity* to resolve the issue. Yet the Board's obligation to prevent and remedy unfair labor practices does not permit it to completely ignore conduct that raises statutory concerns. Instead the Board should keep a watchful eye upon the collective bargaining process, albeit from a reasonable distance.

In a move back to the *Airco-Yourga Trucking* rule, the Board held in *Suburban Motor Freight, Inc.*[104] that it would not honor an arbitration award "unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator."[105] The Board agreed with scholarly and judicial criticism of *Electronic Reproduction* as an "unwarranted extension of the *Spielberg* doctrine and an impermissible delegation" of the Board's jurisdiction to decide unfair labor practice issues.[106] The Board also returned to the *Airco* requirement that the award must indicate that the arbitrator ruled on the statutory issue and the *Yourga Trucking* assignment of the burden of proof to the party seeking Board deferral.[107] Thus, the employee in the "poor work performance" hypothetical could once again secure a trial de novo on her unfair labor practice claim.

The Board's most recent pronouncement on post-settlement deferral is contained in *Olin Corp.*, decided in 1984.[108] Charting a course between the presumption favoring deferral, created by the *Electronic Reproduction* rule, and the obstacles to deferral erected by the *Airco* and *Yourga Trucking* decisions, the Board held that the unfair labor practice issue need not be expressly considered by the arbitrator.[109] Instead, under *Olin*, it is sufficient that the statutory and contractual issues are factually parallel and that the arbitrator has been presented *generally* with facts relevant to resolving the statutory issue. The Board also clarified *Spielberg*'s "clearly repugnant" standard as requiring the extreme showing that the award not be "susceptible to an interpretation consistent with the Act."[110] Finally, the Board held that the burden of proving the inadequate scope or clear repugnance of the award rests with the party seeking a Board hearing.[111]

In the hypothetical case discussed above, the Board would probably defer under the standards established by *Olin*. It is unlikely that the General Counsel could

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104. 247 N.L.R.B. 146 (1980).

105. *Id.* at 146–47.

106. *Id.* at 146 & n.5. *See also* Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977) (Board could not defer when the record failed to show that the arbitration panel clearly decided the unfair labor practice issue); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975); Simon-Rose, *Deferral Under* Collyer *by the NLRB of Section 8(a)(3) Cases*, 27 LAB. L.J. 201, 209–12 (1976).

107. Suburban Motor Freight, Inc., 247 N.L.R.B. 146, 146–47 (1980).

After *Suburban Motor Freight* the Board in Professional Porter & Window Cleaning Co., 263 N.L.R.B. 136 (1982), refused to defer to an arbitrator's denial of a grievance involving a discharge. The employee had not mentioned the unfair labor practice issue in the arbitration, except to furnish the arbitrator with a copy of the complaint. While noting the absence of any evidence on the unfair labor practice issue, the arbitrator concluded that the employee had not been discharged for union activity. Before the Board, the employee alleged a violation of § 8(a)(1).

Dissenting, Member Hunter articulated a two-step "adequate consideration" standard that would become the basis for the *Olin* decision. *See infra* notes 108–11 and accompanying text. According to Member Hunter, the unfair labor practice issue has been adequately considered if "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) it appears from the record that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." Professional Porter & Window Cleaning Co., 263 N.L.R.B. 136, 145 (1982) (Hunter, Mem., dissenting). The majority, however, seemed to ignore the first step, arguing that the facts of the case showed that considering "relevant facts does not necessarily lead to consideration of the statutory issue." *Id.* at 138. But if the contractual and statutory issues are indeed parallel in their protection of the employee, then facts relevant to the statutory issue will assure adequate consideration.

108. Olin Corp., 268 N.L.R.B. 573 (1984).

109. *Id.* at 576–77.

110. *Id.* at 577.

111. *Id.* at 574.

persuade the Board that the contractual and statutory issues are not parallel, since a finding of "just cause" dismissal would be inconsistent with a discriminatory discharge.[112] Also, the arbitrator was presented generally with the facts necessary to resolve the unfair labor practice issue and there was both a business justification for the discharge and affirmative evidence of no unlawful discrimination.

The Board has easily resolved other post-settlement deferral issues. For example, before *Olin*, the Board had consistently refused to defer in cases involving both unlawful employer domination[113] and retaliation for using Board procedures.[114] The Board has also deferred to pre-award settlements produced by the grievance procedures.[115] The *Spielberg* and *Olin* standards are applied in these cases, just as they are in cases involving arbitration awards.[116]

b. *Pre-Settlement Deferral*

A different hypothetical is needed to illustrate the pre-settlement deferral issue.[117] Assume a collective bargaining agreement permits the employer to subcontract unit work only "to meet an economic emergency and then only for the duration of such emergency." The agreement also contains a provision preventing discipline or discharge without "just cause" as well as a broad arbitration provision covering all disputes regarding the "meaning, interpretation, and application" of the agreement. During the term of the contract, the employer calculated that it could reduce labor costs, lower the price of its product, and avoid losing its market share by subcontracting a portion of the work performed by union employees. Furthermore, assume the employer then subcontracts the work, the union files a charge with the Board alleging a unilateral change in conditions of employment, and the union steward, who has threatened to file a grievance over the subcontracting, is terminated on the basis of an unauthorized absence from his work station. If the union bypasses the grievance procedure in favor of filing charges claiming a unilateral change in a mandatory subject of bargaining and a discriminatory discharge, the Board must decide whether to exercise jurisdiction or to require the use of the contractual grievance procedure.

Since the duty to bargain continues throughout the term of the agreement, the Board has jurisdiction to decide whether alleged unilateral changes occurring during the term of the agreement violate the duty to bargain.[118] Traditionally, the Board has

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112. *See, e.g.*, Saucelito Ranch, 85 Lab. Arb. (BNA) 282, 285–86 (1985). But a legitimate business reason, such as poor work performance, may shield the employer from liability both under the contract and under the statute.

113. *See* Servair, Inc., 236 N.L.R.B. 1278 (1978), *modified by* Servair, Inc. v. NLRB, 607 F.2d 258 (9th Cir. 1979) (adopting the decision of the ALJ who characterized the proscription against employer interference as a "principal provision" assuring employees the exercise of free choice in the selection of their bargaining representative).

114. *See* Filmation Assocs. Inc., 227 N.L.R.B. 1721 (1977) (noting that the prohibition against retaliation preserves the integrity of the Board's processes by guaranteeing the right of employees to participate in its investigation procedures).

115. *See* Griffith-Hope Co., 275 N.L.R.B. 487 (1985); Combustion Eng'g, 272 N.L.R.B. 215 (1984).

116. *See* Combustion Eng'g, 272 N.L.R.B. 215, 216–17 (1984).

117. As used here, "pre-settlement" replaces the more common reference to pre-arbitral deferral. The former term is more inclusive and reflects the Board's practice of treating both arbitral awards and pre-arbitral settlements identically. *See infra* text accompanying note 357.

118. *See* NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967). *See also* Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355, 368–87 (1985) (recommending that the duty to bargain during the term

eschewed the role of policing the parties' contracts, preferring the more limited role of determining whether the alleged conduct attempted to undermine the collective bargaining process.[119] Yet, the Board has not hesitated to exercise jurisdiction where the grievance procedure appeared incapable of resolving the dispute.[120] After approximately thirty years of deferring to grievance procedures, in *Collyer Insulated Wire*[121] the Board articulated a range of factors that determine the ability of grievance procedures to resolve a dispute. These factors concern the stability of the bargaining relationship, the suitability of collective bargaining to resolve a dispute, the willingness of the parties to submit to a grievance procedure, and the absence of hostility to employee statutory rights.[122] When the Board determines that the parties' settlement procedures cannot fairly resolve a dispute involving statutory rights, it should not defer. After *Collyer*, adversarial union and employee relations,[123] employer rejection of the collective bargaining process,[124] and employer refusal to proceed with the grievance arbitration procedure[125] were deemed grounds for denying deferral.

The decisions to defer in *Collyer* and many similar cases, although opposed as an abdication of the Board's authority to decide unfair labor practice issues,[126] were relatively easy.[127] In these cases, the employers' alleged unilateral changes typically would violate subsection 8(a)(5) of the Act[128] only if such changes were deemed contractually unauthorized. Thus, the statutory and contractual issues were coextensive and the Board benefitted from knowing what the contract permitted. Since the arbitrator was deemed to have "special skill and experience in deciding matters arising under established bargaining relationships,"[129] the Board routinely deferred.

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of a collective bargaining agreement should only consist of a duty to follow the contractual grievance-arbitration procedure and arguing that Board unfair labor practice proceedings should be stayed only when an arbitrator's interpretation of party rights would help resolve the unfair labor practice issue).

119. *See* Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943). In deferring to the parties' grievance-arbitration procedure the Board said:

> We are not, however, convinced that this series of unilateral decisions by the respondent was part of a conscious campaign on its part to undermine the authority and prestige of the Union as the collective bargaining representative of the respondent's employees or to evade the respondent's obligation to recognize and deal with the Union as such representative.

Id. at 705. *Accord* McDonnell Aircraft Corp., 109 N.L.R.B. 930, 934 (1954) ("In these circumstances, we do not view the action of the Respondent in reallocating the clerical work of some of the tool crib attendants in department 144 by assigning it to factory clericals as a subversion or disparagement of the collective-bargaining process.").

120. *See* Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410 (1964) (exercising jurisdiction when the employer's unilateral action was not covered by the grievance-arbitration procedure).

121. 192 N.L.R.B. 837 (1971).

122. *Id.* at 842.

123. *See* Kansas Meat Packers, 198 N.L.R.B. 543 (1972).

124. *See* Mountain State Constr. Co., 203 N.L.R.B. 1085 (1973); Joseph T. Ryerson & Sons, Inc., 199 N.L.R.B. 461 (1972).

125. *See* Gary-Hobart Water Corp., 210 N.L.R.B. 742 (1974).

126. *See* National Radio Co., 198 N.L.R.B. 527, 532–36 (1972) (Fanning & Jenkins, Mems., dissenting); Collyer Insulated Wire, 192 N.L.R.B. 837, 849 (1971) (Fanning, Mem., dissenting); *Id.* at 856 (Jenkins, Mem., dissenting).

127. *See* Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969); American Oil Co., 152 N.L.R.B. 492 (1965); Flintkote Co., 149 N.L.R.B. 1561 (1964); United Tel. Co., 112 N.L.R.B. 779 (1955); McDonnell Aircraft Corp., 109 N.L.R.B. 930 (1954); Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951); Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943). In *Consolidated Aircraft*, the Board also deferred a § 8(a)(3) complaint to the grievance-arbitration procedure. *But see* Marlboro Cotton Mills, 53 N.L.R.B. 965 (1943) (refusing to defer a § 8(a)(3) complaint).

128. For text of the Act, see *supra* note 30.

129. Collyer Insulated Wire, 192 N.L.R.B. 837, 839 (1971).

For example in the hypothetical case, the employer's subcontracting would violate subsection 8(a)(5) only if it was not authorized by the contract. As the parties' "contract reader," the arbitrator would decide whether the employer exceeded its contractual authority.[130] *Collyer*, therefore, would require deferral of the union's allegation of unilateral changes.

Cases involving individual rights, such as the union steward's allegation of discriminatory discharge, present distinct problems, and the Board has treated the deferral question differently in such cases. In *National Radio Co.*,[131] decided one year after *Collyer*, the Board deferred a case involving the discharge of a union president, allegedly in violation of subsection 8(a)(3) of the Act. The crucial question for the Board was whether the grievance procedure could "resolve [the] dispute in a manner consistent with the standards of *Spielberg*."[132] Since the contract contained a "just cause" provision, making a nonrepugnant arbitral decision possible, the Board answered in the affirmative.[133]

The *National Radio* majority made the following observation about accommodating the role of private settlement with the Board's role of enforcing the statute:

> Both [statutory and contractual] jurisdictions exist by virtue of congressional action, and our duty to serve the objectives of Congress requires that we seek a rational accommodation within that duality. We may not abdicate our statutory duty to prevent and remedy unfair labor practices. Yet, once an exclusive agent has been chosen by employees to represent them, we are charged with a duty fully to protect the structure of collective representation and the freedom of the parties to establish and maintain an effective and productive relationship.[134]

The Board felt that the collective bargaining relationship would be strengthened by "mutual reliance on contract procedures" and could be disrupted by unnecessary Board intervention.[135]

The dissent argued that pre-settlement deferral in individual rights cases amounted to "a subcontracting to a private tribunal of the determination of rights conferred and guaranteed solely by the statute."[136] They argued that the reasons justifying deferral in contract interpretation cases did not exist in cases involving individual statutory rights. In their view, Congress made the Board, and not arbitrators, responsible for determining violations of the Act.[137]

The *National Radio* rule fared well until the Board's landmark decision in *General American Transportation Corp.*[138] Chairman Murphy, who joined the Board after the *Collyer* and *National Radio* decisions, seized upon the distinction between

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130. *See* St. Antoine, *supra* note 69, at 1140.

131. 198 N.L.R.B. 527 (1972).

132. *Id.* at 531.

133. *Id.* As evidence of the capability of the grievance-arbitration process to deal with disputes involving unfair labor practice issues, the Board noted the increased demand for arbitrators, the large percentage of arbitration cases involving the "just cause" issue (nearly half), and the prevalence of contractual grievance-arbitration provisions.

134. *Id.* (footnote omitted).

135. *Id.* at 532.

136. *Id.* at 533 (Fannings & Jenkins, Mems., dissenting).

137. *Id.*

138. 228 N.L.R.B. 808 (1977).

unfair labor practice cases alleging violations of the duty to bargain, which turn on contract interpretation, and cases alleging violations of statutory provisions protecting individuals. She held, in a pivotal concurrence, that deferral was appropriate in cases involving contract interpretation but inappropriate in resolving issues of individual protection under the statute.[139] After *General American Transportation*, the Board would defer on the subcontracting issue in the hypothetical case, since the unfair labor practice turns on whether the contract gave the employer the power to subcontract under these circumstances.[140] On the other hand, the Board would not defer on the union steward's claim of unlawful discrimination.[141]

United Technologies Corp., decided the same day as *Olin*, reiterated the crucial *Collyer* concerns of bargaining stability and case suitability.[142] Moreover, the Board extended the relevance of these factors to all cases raising issues under subsections 8(a)(1), (3), (5) and subsections 8(b)(1)(A), (2), (3) of the Act.[143] In addition, the Board reaffirmed a "rule of reason," requiring it to exercise jurisdiction when the parties' process appears incapable of fairly resolving the dispute and also to test the adequacy of the process against the *Spielberg* standards of review.[144]

The following paragraph capsulizes the Board's reasoning in *United Technologies*:

> It is fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their contract. Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract. In our view, the statutory purpose of encouraging the practice and procedure of collective

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139. *Id.* at 813 (Murphy, Chr., concurring).

140. *See, e.g.*, Robinson, 228 N.L.R.B. 828 (1977).

141. *See, e.g.*, General Am. Transp. Corp., 228 N.L.R.B. 808 (1977) (deferral was not permitted because the charge involved individual rights).

142. United Technologies Corp., 268 N.L.R.B. 557 (1984). The Board readopted the pre-arbitral deferral standards of *Collyer*. As a result, the following circumstances weigh heavily in favor of deferral: (1) Whether the dispute arises within the confines of a long and productive collective bargaining relationship; (2) the absence of a claim of employer animosity to the employees' exercise of protected rights; (3) whether the parties' contract provides for arbitration in a broad range of disputes; (4) whether the arbitration clause clearly encompasses the dispute at issue; (5) whether the employer has asserted its willingness to utilize arbitration to resolve the dispute; and (6) whether the dispute is eminently well-suited to resolution by arbitration. *See* Collyer Insulated Wire, 192 N.L.R.B. 837, 842 (1971). The Board's citation, however, of United Aircraft Corp., 204 N.L.R.B. 879 (1972), in which the Board deferred even though the employer had committed unfair labor practices in the case under consideration, may lessen the significance of the second factor.

143. For text of the Act, see *supra* note 30.

144. Under the "rule of reason" the Board will defer only if it reasonably believes the arbitration procedures would resolve the dispute in a manner consistent with the criteria of *Spielberg*. Therefore, the Board will not defer in the following cases:

> [1] [W]here the interests of the union which might be expected to represent the employee filing the unfair labor practice charge are adverse to those of the employee; . . . [2] Where the respondent's conduct constitutes a rejection of the principles of collective bargaining; . . . [3] Where, after deferral, the respondent has refused to proceed to arbitration . . . .

United Technologies Corp., 268 N.L.R.B. 557, 560 (1984) (citing General Am. Transp. Corp., 228 N.L.R.B. 808, 817 (1977)).

bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief.[145]

While endorsing the landmark *Spielberg*, *Dubo*, and *Collyer* decisions, Board Member Zimmerman rejected the majority's extension of *Collyer* to cases arising under subsections 8(a)(1), (3) and subsections 8(b)(1)(A), (2) as a "[needless sacrifice of] basic safeguards for individual employee rights under the Act."[146] Instead, he adopted Chairman Murphy's approach in *General American Transportation*, holding deferral appropriate only where "disputes essentially involve the interpretation of a collective bargaining agreement."[147]

c. *Judicial and Scholarly Reaction*

Before *Olin* and *United Technologies*, court decisions were generally supportive of the Board's developing deferral policy. Several Supreme Court decisions supported the use of collective bargaining procedures to enforce statutory rights[148] and circuit courts typically enforced deferral decisions as falling within the sound exercise of administrative discretion.[149]

Since the Board's pronouncements in *Olin* and *United Technologies*, however, judicial and academic critics have argued that the articulated deferral rules are

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145. United Technologies Corp., 268 N.L.R.B. 557, 559 (1984).

146. *Id.* at 561 (Zimmerman, Mem., dissenting).

147. *Id.*

148. In the *Steelworkers Trilogy*, (United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)), the Supreme Court promoted arbitration as a means of resolving disputes arising under the parties' contract. *See also* William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 17 (1974) (specifically approving the *Collyer* doctrine, stating that it harmonized the Board's enforcement jurisdiction with the congressional preference for private adjustment procedures); Boys Mkts., Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 242–49 (1970) (granting injunctive relief barring a union strike over an arbitrable grievance, despite the anti-injunctive provisions of the Norris-LaGuardia Act, due to a concern for encouraging the resolution of labor disputes through arbitration procedures); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652–53 (1965) (holding that an employee claiming a breach of contract by the employer must attempt contractual grievance and arbitration procedures, and noting Congress' express approval of the "contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant"); Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 270–71 n.7 (1964) (compelling the employer to arbitrate a jurisdictional dispute, even though only one of the two competing unions would be party to the proceeding and even though representation questions reserved for the Board were intertwined and predicating its decision in part on the Board's post-award deferral policy).

Support for this Article's interpretation of the Board's relationship to private settlement procedures is found in the Court's observation that after the Wagner Act became law and labor unions became stronger, "congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." Boys Mkts. Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 251 (1970).

149. In general, the circuit courts have deferred to Board arbitral decisions, unless the Board abused its discretion in failing to adhere to established standards or by applying invalid standards. *See* NLRB v. Container Corp. of Am., 649 F.2d 1213 (6th Cir. 1981) (approving the Board's refusal to defer in an individual rights case after *General Am. Transp.*); Locals 700, 743, 1746, International Ass'n of Mach. & Aerospace Workers v. NLRB, 525 F.2d 237 (2d Cir. 1975) (affirming the Board's deferral of § 8(a)(3) and other individual rights charges to arbitration after *National Radio*); Local Union No. 2188, IBEW v. NLRB, 494 F.2d 1087 (D.C. Cir. 1974) (approving *Collyer* but cautioning against uncritically applying the pre-arbitral policy); Nabisco, Inc. v. NLRB, 479 F.2d 770 (2d Cir. 1973) (affirming the Board's decision to defer the company's unilateral change claim against the union to the grievance-arbitration procedure). *But see* NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 377 (3d Cir. 1980) (Garth, J., concurring) (arguing that the Board's deferral rules are not rules of discretion but rules of law; thus the Board lacks discretion in individual cases, and it is therefore inappropriate to review deferral decisions under the "abuse of discretion" standard instead of the lower "legal error" standard).

inconsistent with the Act and its enforcement scheme.[150] Citing various Supreme Court holdings, they have argued that the statutory provisions protecting individual employees should be enforced by the Board, a public agency, and not by private contractual procedures.[151] The critics have concluded that by deferring to grievance-arbitration procedures in cases involving individual rights, the Board abdicates its enforcement obligation or, at the very least, the Board's deferral policy permits arbitration without adequate oversight.[152] Critics have also argued that grievance-arbitration procedures are inherently incapable of resolving statutory issues in that arbitration is less likely to produce a fair result due to its informality and lack of procedural safeguards,[153] an arbitrator's authority as defined by the collective bargaining agreement may not permit her to decide statutory issues,[154] and the give and take of collective bargaining may result in the sacrifice of individual rights to the institutional interests of employers and unions.[155]

On the other hand, one influential critic has argued that the Board's deferral policy does not go far enough.[156] Since collective bargaining agreements waive many statutory rights, in his opinion, the Board's deferral rules frequently permit too much scrutiny of private settlement procedures.[157] As the following theory suggests, however, none of these criticisms will survive close scrutiny.[158]

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150. For judicial criticism of *Olin* and *United Technologies*, see *infra* note 376. For scholarly commentary, see Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23 (1985); Gregory & Mak, *Significant Decisions of the NLRB, 1984: The Reagan Board's "Celebration" of the 50th Anniversary of the National Labor Relations Act*, 18 CONN. L. REV. 7 (1985); Henkel & Kelly, *Deferral to Arbitration after* Olin *and* United Technologies: *Has the NLRB Gone Too Far?*; 43 WASH. & LEE L. REV. 37 (1986); Levy, *The Undimensional Perspective of the Reagan Labor Board*, 16 RUTGERS L.J. 269 (1985); Mack & Bernstein, *NLRB Deferral to the Arbitration Process: The Arbitrator's Demanding Role*, 40 ARB. J. 33 (1985); Morris, *NLRB Deferral to the Arbitration Process: The Arbitrator's Awesome Responsibility*, 7 INDUS. REL. L.J. 290 (1985); Moses, *Deferral to Arbitration in Individual Rights Cases: A Re-examination of* Spielberg, 51 TENN. L. REV. 187 (1984); Peck, *supra* note 118; Ray, *Individual Rights and NLRB Deferral to the Arbitration Process: A Proposal*, 28 B.C.L. Rev. 1 (1986); Shank, *Deferral to Arbitration: Accomodation of Competing Statutory Policies*, 2 HOFSTRA LAB. L.J. 211 (1985); Vause, *The NLRB Policy on Deferral to Arbitration—Deference or Abdication?*, 58 FLA. B.J. 461 (1984); Comment, *The National Labor Relations Board's Policy of Deferring to Arbitration*, 13 FLA. ST. U.L. REV. 1141 (1986).

151. *See infra* notes 207–45 and accompanying text.

152. *See infra* notes 269–73 and accompanying text.

153. *See infra* notes 259–68 and accompanying text.

154. *See infra* notes 250–58 and accompanying text.

155. *See infra* notes 246–49 and accompanying text.

156. *See infra* notes 274–91 and accompanying text.

157. *Id.*

158. The purpose of this Article is not to enter the debate about whether the Act should be scuttled in favor of some other approach to ordering labor relations in our society. *See, e.g.*, Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); Getman & Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415 (1983); Verkuil, *Whose Common Law for Labor Relations?*, 92 YALE L.J. 1409 (1983). Nor is it to debate the impact of the Act and its interpretation by the Board and courts on the social and political development of workers. *See, e.g.*, Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982); Klare, *Labor Law as Ideology: Toward A New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978); Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981). Rather, the reality of the Act, as interpreted by the Board and the courts, is taken as a given. The purpose of this Article is to suggest a theory that will help both the Board and the courts in resolving the thorny problem of defining the relationship between Board jurisdiction and private settlement procedures.

II. A General Theory of Deferral

A. *Key Elements*

Only through an appreciation of the interrelated purposes of the Wagner, Taft-Hartley, and Landrum-Griffin Acts can the proper relationship between the Board's jurisdiction and grievance procedures be fully understood.[159] The basis for such an understanding is found in the legislative history. The congressional design is also revealed in judicial and scholarly interpretation of the Act's key provisions, as well as in the modern reality of collective bargaining.

1. *Legislative History*

The Seventy-fourth Congress inaugurated collective bargaining as an answer to the industrial strife that had characterized early twentieth century America.[160] Collective bargaining was intended to give workers a voice in determining their working conditions, to raise a standard of living that had been shattered by the Depression, and to protect employees from injustice in the workplace.[161] To accomplish these representational, economic, and equitable purposes, Congress granted employees organizational rights and protected them from coercion and interference by hostile employers.[162] Professors Cox, Bok, and Gorman explained these goals as follows:

> The Wagner Act was concerned primarily with the organizational phases of labor relations. The aim was to prevent practices which interfered with the growth of labor unions

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159. The centerpiece of the grievance procedure is arbitration. Since deferral policy looks to pre-arbitral settlements as well as arbitral awards, the broader reference has been used.

160. *See* National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1982) which states the following:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

For a detailed account of this pre-Act industrial strife, see I. Bernstein, A History of the American Worker 1933-1941: Turbulent Years 217–317 (1970).

161. *See* National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1982), which states the following:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rate and working conditions within and between industries.

See also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1936) (upholding the constitutionality of the Wagner Act and stating, "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."); Statement by Senator Robert F. Wagner (May 15, 1935), *reprinted in* NLRB, 2 Legislative History of the National Labor Relations Act, 1935 at 2321 (1985) (characterizing the Bill as intended to rescue the isolated worker "[c]aught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise" by assuring him dignity and freedom through "cooperation with others of his group"); H. Rep. No. 969, 74th Cong., 1st Sess. 6 (1935), *reprinted in* NLRB, 2 Legislative History of the National Labor Relations Act, 1935 at 2915 (1985) (emphasizing the legislative intent to "remove certain important sources of industrial unrest engendered, first, by the denial of the right of employees to organize and by the refusal of employers to accept the procedure of collective bargaining, and second, by failure to adjust wages, hours, and working conditions . . . ").

162. *See* National Labor Relations Act §§ 7–8, 29 U.S.C. §§ 157–158 (1982). For text of these sections of the Act, see *supra* notes 7, 30.

> and the development of collective bargaining. Once the union was organized and the employer accorded it recognition as the representative of his employees, the function of the statute, as originally conceived, was completed.[163]

Under the Wagner Act, the NLRB's function was to preserve the organizational rights of employees by preventing employer practices that diminished such rights.[164]

While the Taft-Hartley Act put some restraints on unions, it did not change the fundamental concept of collective bargaining or the role of the Board in protecting employee free choice. On the contrary, the Taft-Hartley Act added provisions to the NLRA that emphasized the role of collective bargaining in resolving employment disputes. For instance, one provision contained an explicit statutory preference for the voluntary adjustment of jurisdictional disputes,[165] while another expressly affirmed private dispute settlement as the preferred method for settling grievances arising under collective bargaining agreements.[166]

The Landrum-Griffin Act created yet another layer of union regulation, designed primarily to protect individuals and minority groups within the union.[167] Even though these amendments emphasized individual rights, such rights were not intended to displace the primary role of the union representative or the institution of collective bargaining in protecting the interests of employees.[168] Rather, the amendments made the unions more accountable to their constituencies. In this way the individual was to enjoy greater protection through the collective bargaining process.[169] Significantly, Congress chose the courts and not the Board as the vehicle to enforce the individual rights granted union members by the Landrum-Griffin Act.[170]

The congressional scheme that emerges from this legislative history asserts the primacy of collective bargaining to national labor relations policy while assigning the

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163. A. Cox, D. Bok, & R. Gorman, Cases and Materials on Labor Law 85 (10th ed. 1986).

164. *See* Statement of Senator Robert F. Wagner, *supra* note 161, at 1414–25 (Subsections 8(a)(1)–(3) of the Act were designed to protect employees from coercion or interference in the exercise of their organizational rights; § 8(a)(4) was designed to help the Board carry out its enforcement function, and § 8(a)(5) was to give effect to the employees' collective bargaining rights by requiring the employer to reciprocate).

165. *See* National Labor Relations (Taft-Hartley) Act § 10(k), 29 U.S.C. § 160(k) (1982), which states the following:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

166. *See* National Labor Relations (Taft-Hartley) Act § 203(d), 29 U.S.C. § 173(d) (1982), which states the following:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

See also Boys Mkts., Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 251 (1970) (characterizing the Taft-Hartley Act as a shift in emphasis from protecting the "nascent labor movement" to encouraging bargaining and peaceful dispute resolution).

167. *See* National Labor Relations (Landrum-Griffin) Act, 29 U.S.C. §§ 401–531 (1982).

168. *See* National Labor Relations (Landrum-Griffin) Act § 2(a), (b), 29 U.S.C. § 401(a), (b) (1982).

169. *See generally* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851 (1960); Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609 (1959).

170. *See* National Labor Relations (Landrum-Griffin) Act §§ 101–105, 29 U.S.C. §§ 411–415 (1982).

Board the principal task of assuring employees the freedom to choose collective bargaining as a means of protecting their vital employment interests.[171]

2. *Policy Interpretation*

True to Congress' conception of collective bargaining and the role of exclusive representation, unions have been permitted to waive the statutory rights of individual employees in order to obtain greater collective benefits. This "waiver doctrine," as interpreted by the Supreme Court, reveals valuable insights about the intended relationship under the Act between the individual and the collective.[172] In *Metropolitan Edison Co. v. NLRB*,[173] the Court noted that unions can waive individual as well as collective statutory rights in order to secure gains they consider to be more valuable, provided the union meets its duty to fairly represent its members.[174] Under the waiver doctrine, unions are entrusted with and are expected to exercise considerable discretion in protecting the rights of individual employees. Waivers, therefore, are simply a way of permitting unions to serve their statutory purpose.[175]

But waivers of individual rights are premised on two assumptions: that the union fairly represents the members of the collective bargaining unit and that unit employees freely choose their collective bargaining representative.[176] When these two assumptions are not well-founded, collective bargaining's theoretical underpinnings collapse. Thus, the Supreme Court in *NLRB v. Magnavox Co.*[177] said that

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171. *See* Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984). For an historical account of the Board's central role in resolving representation disputes, see I. BERNSTEIN, *supra*, note 160, at 172–216.

172. For a valiant effort to formulate a comprehensive nonwaiver principle, see Harper, *Union Waiver of Employee Rights Under the NLRA: Part I*, 4 INDUS. REL. L.J. 335 (1981).

173. 460 U.S. 693 (1983).

174. *Id.* at 705–06. See also NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), in which the Court stated:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." Thus, only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. "The majority-rule concept is today unquestionably at the center of our federal labor policy."

Id. at 180 (footnotes omitted).

175. *See* NLRB v. Magnavox Co., 415 U.S. 322, 325–26 (1974); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1955).

This Article does not argue that collective bargaining agreements, through their general provisions, waive the individual statutory rights of bargaining unit employees. The "clear and unmistakable" waiver requirement of *Metropolitan Edison* is inconsistent with such a position. *Cf.* Edwards, *supra* note 150. Rather, the waiver doctrine reflects a statutory design that contemplates: (1) the competency of the union to protect individual rights; (2) a primary role for the union in protecting those rights; and (3) a reduced role for the Board in protecting individual rights after the collective bargaining agreement has been executed.

176. *See* NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974); Gale Prods., 142 N.L.R.B. 1246, 1249 (1963) (describing the test for valid contractual waivers as follows:"The validity of a contractual waiver of employee rights must depend, however, upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver.").

177. 415 U.S. 322 (1974).

employee rights relating to the "selection, retention, or displacement of the collective-bargaining agent" could not be waived and, therefore, held that a union could not waive the statutory right of employees to distribute representational literature on the employer's premises.[178] In that case, a distinction between dissidents and union supporters could easily have been justified by the view that the union would adequately protect the interests of supporters, but the Court went even further by holding that even the distributional rights of pro-union employees could not be waived by the union.[179] Thus, the majority stressed the importance of representation questions under the Act.

The union's role as the protector of employee interests cannot be properly fulfilled unless the union is freely selected and retained; employees must retain the right to change representatives.[180] Thus, the Board's principal function is to preserve this freedom of choice for employees.[181]

3. *The Collective Bargaining Experience*

Experience under the National Labor Relations Act reveals that Congress' confidence in collective bargaining has been justified. First, the essence of collective bargaining has become the bilateral determination of wages, hours, and terms and conditions of employment.[182] It is also common for the parties to negotiate collectively about matters relating to the scope and direction of the enterprise.[183] Second, the earnings of organized workers in many private sector industries have historically outpaced those of similarly situated unorganized workers.[184] Third, due to contractual grievance provisions, organized workers enjoy broad protection from employment injustice.[185] In the words of Professor Feller: "The [collective bargain-

178. *Id.* at 329 (Stewart, J., concurring in part and dissenting in part).

179. *Id.* at 324–27. *See* Magnavox Co., 195 N.L.R.B. 265 (1972) (in which the Board similarly extended this prohibition against waiver of distributional rights to union supporters); *cf.* Gale Prods., 142 N.L.R.B. 1246 (1963).

180. *But see* RCA Del Caribe, Inc., 262 N.L.R.B. 963 (1982) (extolling the stability of collective bargaining relationships and employee free choice as complementary policies best accommodated by requiring employers to continue negotiating with an incumbent union, even when a rival has filed a petition for an election).

181. *See* NLRB v. Magnavox Co., 415 U.S. 322, 327–32 (1974) (Stewart, J., concurring in part and dissenting in part).

182. *See* Gould, *Fifty Years Under the National Labor Relations Act: A Retrospective View*, 37 LAB. L.J. 235 (1986); Schlossberg & Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 37 LAB. L.J. 595 (1986).

183. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (bargaining on such subjects is permissible but the union's ability to use economic pressure to support its bargaining position is limited); CBNC, *supra* note 56, at 65:1–183 (management rights in traditional areas of managerial sovereignty, such as managing the business, introducing technological changes in the organization of production, and relocating facilities, may be preserved or limited by collective bargaining).

The new cooperative trend in labor-management relations has increased the importance of party discussions on nonmandatory subjects of bargaining. *See* T. KOCHAN, H. KATZ, & R. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS, 179–205 (1986); Gould, *supra* note 182; Schlossberg & Fetter, *supra* note 182.

184. *See* R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO?, 43–60, 78–93 (1984); A. REES, THE ECONOMICS OF TRADE UNIONS 65–93 (1977); L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 567–82 (6th ed. 1974); Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1004–06 (1986); Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353 (1984).

Yet recent surveys suggest a trend that would ultimately close the gap between unionized and nonunionized workers. Nonunionized workers in manufacturing and nonmanufacturing firms have recently received larger increases than unionized workers. *See, e.g., Nonunion/Union Wage Increase Prediction*, 123 Lab. Rel. Rep. (BNA) 146 (October 20, 1986).

185. *See* R. FREEMAN & J. MEDOFF, *supra* note 184, at 94–110 (the union voice improves the workplace, primarily

ing] agreement's most significant function is to provide a system for the adjudication, at the instance of an aggrieved employee, of complaints that management, in exercising its power to direct the work force, has not complied with the rules jointly agreed to."[186] Fourth, the majority of the Board's cases involving employer coercion and interference with employee rights have dealt with conduct that occurred before the parties entered into a collective bargaining agreement.[187] Thus, experience teaches that the Board's major concern is pre-agreement misconduct, designed to forestall, rather than destroy, the protective regime of collective bargaining.

B. *The Theory*

Against this backdrop of the congressional design of the Act and the experience of collective bargaining, a practical guide to deferral begins to emerge. These practical guidelines essentially provide a general theory of deferral that will further national labor policy as embodied in the National Labor Relations Act as well as provide a structured analysis of when the Board should exercise its decision-making authority and when it should defer.

The first instance in which the Board should decide the issue, rather than defer, arises from the Board's task of protecting the workers' right to organize, which is the Board's primary duty under the Act. Additionally, as evidenced by its critical jurisdiction in representation cases, the Board also has the primary responsibility for defining the structure of collective bargaining. In fact, before agreements are in place, the Board is the only body available to resolve questions of representation. As the Supreme Court noted in *Magnavox*, after agreements are in place, the union's role as representative may be inconsistent with the resolution of basic representational issues through collective bargaining.[188] Thus, deferring representation questions would be inconsistent with the Board's responsibility in this area. In the context of

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through the grievance procedure, thereby reducing turnover and increasing tenure); A. REES, *supra* note 184, at 26 (suggesting unfair and arbitrary treatment as a primary reason motivating workers to join unions); Campbell, *supra* note 184, at 1004–10 (explaining that only collectively can employees attain certain goods); Leslie, *supra* note 184 at 356–58 (describing a grievance procedure as a collective good whose costs would be prohibitive in the context of individual bargaining as well as the function of the grievance procedure in protecting the inframarginal employee).

See also D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 465 (1970) in which it is stated:

> Unions have made what is perhaps their greatest contribution in securing fairer treatment for their members at the workplace. In particular, they have made enormous strides to eliminate error, malice, favoritism, and other human failings in the dismissal, discipline, promotion, and preferment of employees. By doing so, they have also encouraged countless nonunion firms to make comparable reforms in order to counter the threat of organization . . . . [F]ew knowledgeable observers would suppose that government tribunals would match the flexibility and competence already achieved through the system of private arbitration established by collective bargaining.

186. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 742 (1973). *See also* I. BERNSTEIN, *supra* note 160, at 775–76, 789.

187. A survey conducted by Ms. Cecil Marlowe of unfair labor practice cases reported between 1979 and 1983 indicates that only 38.5% of the 4557 cases involved post-agreement § 8(a)(1), 8(a)(3), 8(b)(1)(A), 8(b)(2) misconduct. Of the reported 1983 cases involving employer misconduct, 63% were pre-agreement cases. A copy of the survey is on file with the Ohio State Law Journal. *See also* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1780–81 (1983) (a majority of workers discriminatorily discharged in 1980 were discharged during representational campaigns).

188. NLRB v. Magnavox Co., 415 U.S. 322, 325–26 (1974).

unit determination, for example, not only do Board-determined bargaining units[189] establish voting districts for targeted employees, but they also define the bargaining rights and responsibilities of employers and unions. It is axiomatic that collective bargaining cannot effectively fulfill its mission of securing economic and other benefits for employees unless bargaining units are well-suited to furthering the interests of covered employees. Because one of the Board's principal roles in implementing national labor policy is to create these necessary preconditions for collective bargaining,[190] this list of nondeferrable Board functions necessarily includes decisions regarding representation disputes.

Closely associated with representation questions are issues involving employer domination and assistance. Like the representation issue, the employer domination issue should also be decided by the Board. Subsection 8(a)(2) of the Act[191] grew out of a concern that employers could defeat the organizational aspirations of their employees by establishing company unions or more subtly influencing the affairs of labor organizations.[192] Thus, the Board has regarded subsection 8(a)(2) as the "principal provision" for assuring employee free choice in the selection of a collective bargaining representative.[193] As a result of this link between subsection 8(a)(2) and the issue of representation, the employer domination cases present the second context in which the Board should not defer.

Because the Board must be capable of performing its primary function of protecting the rights of employees to decide freely the representational question, and because it retains a supervisory function in other cases, the Board should maximize its own enforcement capability. Indeed, it would be improper for this public agency to rely upon private parties to protect its ability to handle representation and other questions. Subsections 8(a)(4) and 8(b)(1)(A) of the Act[194] arm the Board with the necessary capability to defend this basic jurisdiction. Thus, deferral in such cases is both unnecessary and improper.

The fourth instance in which the Board should not defer is when an unfair labor practice threatens the collective bargaining process. The statute explicitly encourages collective bargaining as providing the most effective forum for employee concerns.[195] Under the statutory structure, the Board, as guardian, is to "oversee and referee" the collective bargaining process.[196] Thus, the Board should not defer when an alleged unfair labor practice threatens that process. One example of such an unfair labor practice is an employer's refusal to supply information relevant to the union's per-

189. *See* National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1982) (specifically charging the Board with making unit determinations). *See also* I. BERNSTEIN, *supra* note 160, at 329 (concerns about potential employer and union abuses led to giving the Board, rather than the parties, this authority).

On the importance of units to the bargaining process, see generally J. ABODEELY, THE NLRB AND THE APPROPRIATE BARGAINING UNIT (rev. ed. 1981); Leslie, *supra* note 184.

190. *See* National Labor Relations Act § 9, 29 U.S.C. § 159 (1982).

191. For text, see *supra* note 30.

192. *See* I. BERNSTEIN, *supra* note 160, at 172–97, 319–20, 332–33.

193. Servair, Inc., 263 N.L.R.B. 1278 (1978), *modified by* Servair Inc. v. N.L.R.B., 607 F.2d 258 (9th Cir. 1979).

194. For text, see *supra* note 30.

195. National Labor Relations Act § 1, 29 U.S.C. § 151 (1982).

196. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

formance of its collective bargaining obligation. According to this general deferral theory, the Board should decide this case rather than defer. Collective bargaining in general and grievance arbitration in particular simply cannot work unless the parties are fully informed about the issues.[197]

Finally, the Board must remain responsible for preventing and remedying unfair labor practices.[198] Because a properly conceived deferral theory must both encourage collective bargaining *and* prevent unfair labor practices, the Board must resolve disputes involving unfair labor practices when the parties' grievance procedure cannot adequately resolve such disputes.

In summary, *a proper deferral policy would preserve the Board's primary role in assuring employee freedom of choice and would permit deferral only when conditions allow collective bargaining to accomplish its statutory purpose.* The Board should not defer when the central focus of its jurisdiction is implicated, namely cases involving representation issues under sections 9 and 8(a)(2) of the Act[199] and cases in which party conduct threatens the Board's effectiveness.[200] Furthermore, as supervisor of the collective bargaining regime, the Board may not defer in cases in which party conduct threatens the collective bargaining process itself[201] and cases in which a fair collective bargaining solution is unlikely or undemonstrated.[202]

Deferral may be appropriate in all other cases arising under subsections 8(a)(1), 8(a)(3), 8(a)(5), 8(b)(1),[203] 8(b)(2), and 8(b)(3) of the Act. In cases in which the

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197. *See* Wellman Thermal Sys., 269 N.L.R.B. 162 (1984); NLRB v. Acme Indus. Co., 385 U.S. 432 (1967); NLRB v. Truitt, 351 U.S. 149 (1956). Regarding the role of information exchange in collective bargaining, see C. STEVENS, STRATEGY AND COLLECTIVE BARGAINING NEGOTIATIONS 21–22 (1963). R. WALTON & R. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 140–41 (1965).

198. *See* National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1982).

199. Examples include whether an employer's newly acquired plant constitutes an accretion to the existing unit and whether an employer unlawfully dominated or assisted a labor organization.

200. For instance, alleged employer or union retaliation for filing unfair labor practice charges.

201. Such as when an employer repudiates key provisions of a collective bargaining agreement or initiates broad scale unilateral changes in the workplace.

202. For example, cases in which the contractual dispute is narrower than the unfair labor practice issue, both the employer and the union have interests adverse to the grievant's, or the quality of the union's representation of the grievant falls below minimum standards.

203. Although the Board in *United Technologies* does not list § 8(b)(1)(B) among the statutory provisions that might be deferred to the grievance procedure, the theory enunciated here suggests that such cases should be deferred where appropriate. For the text of § 8(b)(1)(B), see *supra* note 30.

Typically, § 8(b)(1)(B) cases involve union actions against supervisors who are union members and have engaged in conduct deemed detrimental to the union. *See* Florida Power & Light Co. v. IBEW Local 641, 417 U.S. 790 (1974) (upholding the union's right to fine supervisory members who crossed a picket line during a strike to do rank and file work). *But see* American Broadcasting Co. v. Writers Guild of Am. W., 437 U.S. 411 (1978) (upholding the Board's finding that the union violated § 8(b)(1)(B) by fining supervisory members who crossed the picket line during a strike to do supervisory rather than rank and file work).

Since many of these cases involve the exertion of economic power to reach a contract settlement, deferral questions are not usually raised. Subsection 8(b)(1)(B) issues, however, may arise during the term of a collective bargaining agreement. In this context, as in other deferral cases, the question is whether there is a reason not to defer, such as the destructive nature of a party's conduct or the improbable or undemonstrated fairness of a collective bargaining solution. When no such reason is shown, the Board should defer.

The Board's decision in IBEW Local 1316 (Superior Contractors Assocs., Inc.), 271 N.L.R.B. 338 (1984) (adopting the ALJ's holding that § 8(b)(1)(B) cases may be deferred to arbitration), suggests that the Board will follow this reasoning. *See also* Warehouse Union Local 6, 210 N.L.R.B. 666 (1974); Columbia Typographical Union 101, 207 N.L.R.B. 831 (1973); Mailers Union 36, 199 N.L.R.B. 804 (1972). The *Superior Contractors* case suggests, without good reason, that a stricter test of contractual scope should be applied in § 8(b)(1)(B) cases. There, the union fined a supervisor for exercising his supervisory duties in a way that was "contrary to a member's responsibility" toward the

parties' collective bargaining relationship is stable, the parties are willing to use their grievance-arbitration procedure, and the contract is broad enough to resolve the entire dispute, including unfair labor practice aspects, the Board should insist that the grievance-arbitration procedure run its course. Furthermore, if the procedure has produced a settlement that is consistent with national labor policy, the Board should again defer, provided the procedures have been fair and the contract was broad enough to generate evidence necessary to resolve the unfair labor practice issue.[204]

This general theory also asserts that in this second category of cases the burden of proof should be borne by the party seeking a de novo hearing before the Board. The burden of proof, of course, is not policy neutral in the deferral context. The Board's use of the burden of proof to advance firmly rooted statutory policy is grounded in well-settled procedural policy.[205] Leading commentators have recognized that the proof burden is a handicap that often must be borne by those pressing disfavored claims.[206] Under the burden of proof scheme espoused by this Article, if the General Counsel decides to issue a complaint despite collectively bargained contractual procedures, it is appropriate that she be required to prove the impropriety of any deferral under the Act's pro-collective bargaining policy.

This theory recognizes the Board's enforcement role and suggests that the deferral issue, whether it arises before or after a contractual settlement, is a single problem requiring a uniform approach. Understood correctly, a general theory of deferral is applicable in both pre-settlement and post-settlement cases. The theory also recognizes that in its supervisory role, the Board must intervene when the grievance procedure's capacity for fair resolution is either unlikely or undemonstrated.

C. Criticial Arguments Evaluated

1. *Statutory Rights Require Public Enforcement*

Relying on *Alexander v. Gardner-Denver*,[207] *Barrentine v. Arkansas-Best Freight System, Inc.*,[208] and *McDonald v. City of West Branch*,[209] erstwhile and current critics of Board deferral argue that the rights created under the NLRA may only be enforced by the Board, the statutorily created public enforcement agency.[210]Lest important public rights be sacrificed, they say, private dispute

union. The ALJ refused to defer because the "agreement . . . contain[ed] nothing dealing with the propriety or impropriety of union fines as applied to supervisors." IBEW Local 1316, 271 N.L.R.B. 338, 341 (1984). Since arbitrators may recognize such union actions as a violation of management rights under an agreement, no such narrow provisions need be present to justify deferral under *United Technologies. See, e.g.*, Utility Bd. of City of Key West, 78 Lab. Arb. (BNA) 39, 41–42 (1982) (in upholding the employer's selection of a supervisor outside the seniority system, the arbitrator cited the general principle "that management has the right to select supervisors and this right of selection is an incident of management's right to run its business"); F. ELKOURI & E. ELKOURI, *supra* note 60, at 581–85.

204. "Fairness" in this context refers both to due process and to a reasonably effective quality of representation.

205. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE, § 7.8 at 324–25 (3d ed. 1985).

206. *Id.* (*citing* C. CLARK, CODE PLEADING 609–10 (2d ed. 1947)).

207. 415 U.S. 36 (1974).

208. 450 U.S. 728 (1981).

209. 466 U.S. 284 (1984).

210. *See* Electronic Reproduction Serv. Corp., 213 N.L.R.B. 758, 765 (1984) (Fanning & Jenkins, Mems.,

adjustment must not preclude Board determination of unfair labor practice issues. This position has been endorsed by the Eleventh Circuit Court of Appeals, which used the above cases as the basis for rejecting *Olin*.[211] Significant attention, therefore, must be given to these cases.

Alexander, Barrentine, and *McDonald* addressed the issue of whether prior arbitration awards should be given preclusive effect in subsequent actions brought under Title VII,[212] the Fair Labor Standards Act (FLSA),[213] or 42 U.S.C. § 1983.[214] The Supreme Court held that Congress intended these statutory provisions "to be judicially enforceable . . . and that [arbitration] can not provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that [they are] designed to safeguard."[215]

In none of the cases, however, did the Court suggest that a similar congressional intent underlies the NLRA. In *Barrentine*, for example, the Court explicitly distinguished the NLRA from the FLSA. The Court noted that lower courts "ordinarily defer to collectively bargained dispute-resolution procedures when the parties' dispute arises out of the collective-bargaining process."[216] Such deferral, the Court further noted, advances a national policy favoring collective bargaining.[217] By contrast, the FLSA directly regulates the relationship between the employer and employees by granting employees specific substantive rights guaranteeing minimum standards.[218] The argument that an arbitration award should be given preclusive effect since wages are at the heart of collective bargaining was rejected with the following observation: "In contrast to the Labor Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests *collectively*, the FLSA was designed to give specific minimum protections to *individual* workers . . . ."[219]

In reaching its conclusion in *Alexander, Barrentine*, and *McDonald*, the Court partially relied on the nonwaivability of rights created by Title VII, the FLSA, and

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concurring in part and dissenting in part); United Technologies Corp., 268 N.L.R.B. 557, 561 (1984) (Zimmerman, Mem., dissenting); Peck, *supra* note 118.

211. *See* Taylor v. NLRB, 786 F.2d 1516, *reh'g denied*, 794 F.2d 657 (11th Cir. 1986).

212. Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

213. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981).

214. McDonald v. City of West Branch, 466 U.S. 284 (1981).

215. *Id.* at 290.

216. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 736 (1981).

217. [I]ndividual workers have little, if any, bargaining power, and . . . "by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions," . . . . [T]hese statutes reflect Congress' determination that to improve the economic well-being of workers, and thus to promote industrial peace, the interests of some employees in a bargaining unit may have to be subordinated to the collective interests of a majority of their co-workers. The rights established through this system of majority rule are thus protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" To further this policy, Congress has declared that "final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

Id. at 735 (citations omitted).

218. *Id.* at 734, 737.

219. *Id.* at 739 (emphasis in original).

section 1983.[220] In the Court's view, granting preclusive effect to contractual settlement procedures would have undermined congressional intent. In contrast, statutory rights created under the NLRA are waivable within limits,[221] and the Act specifically provides for the private adjustment of disputes.[222] Furthermore, the Board does not relinquish final authority to decide unfair labor practices through its deferral policy.[223]

In spite of statutory policies that make preclusion inappropriate under Title VII, the FLSA, and section 1983, *Alexander*, *Barrentine*, and *McDonald* permit courts to weigh the arbitration award in resolving the statutory claims.[224] In these cases, the Supreme Court instructed the lower courts to consider the scope of contractual protection, the degree of procedural fairness, the adequacy of the record, and the competence of the arbitrator—giving *great weight* to awards that reflect a full consideration of statutory rights based upon an adequate record.[225] Thus, even when the Court felt bound by clearly articulated statutory policy to deny preclusive effect to arbitration, it still gave this procedure an effect that may be preclusive in many cases. A lesser role for arbitration can hardly be urged under a statute such as the NLRA in which the private legislation and enforcement of employment rights are central to the statutory scheme.[226]

While the minority of the Board, which opposes extending pre-arbitral deferral to cases involving individual rights, draws support from the *Alexander* and *Barrentine* cases,[227] Chairman Murphy's concurring opinion in *General American Transportation*[228] provided the impetus for this view. For Chairman Murphy, the policy of encouraging collective bargaining is different from the policy of protecting the workers' rights of freedom of association, self-organization, and designation of union representatives for the purpose of negotiating the terms and conditions of their employment.[229] Encouraging collective bargaining through deferral is appropriate when the unfair labor practice charge depends on contract interpretation, she argued,

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220. *See* Alexander v. Gardner-Denver, 415 U.S. 36, 51 (1974); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981); McDonald v. City of West Branch, 466 U.S. 284, 292 n.12 (1984).

221. *See* Harper, *Union Waiver of Employee Rights Under the NLRA: Part II: A Fresh Approach to Board Deferral to Arbitration*, 4 INDUS. REL. L.J. 680 (1981).

222. *See* National Labor Relations Act § 203(d), 29 U.S.C. § 173(d) (1982).

223. *See* Olin Corp., 268 N.L.R.B. 573 (1984).

Another objection to arbitration voiced in *Alexander*, *Barrentine*, and *McDonald* is the limited authority of arbitrators as interpreters of the contract. *See, e.g.*, Alexander v. Gardner-Denver, 415 U.S. 36, 53 (1974). Such a concern is not applicable to the Board's deferral policy, however, since *United Technologies* and *Olin* preclude deferral when the contract is of insufficient scope to resolve the unfair labor practice issues. *See supra* notes 110, 144 and accompanying text. *Cf.* Levy, *supra* note 150, at 376.

224. *See* McDonald v. City of West Branch, 466 U.S. 284, 292 n.13 (1984); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 743–44 n.22 (1981); Alexander v. Gardner-Denver, 415 U.S. 36, 60 n.21 (1974).

225. *See supra* note 224.

226. *Cf.* Moses, *supra* note 150, at 233; Peck, *supra* note 118, at 382, 388 (arguing that arbitration could be given considerable weight but the Board should deal with the merits).

227. *See* United Technologies Corp., 268 N.L.R.B. 557, 561 (1984) (Zimmerman, Mem., dissenting).

228. General Am. Transp. Corp., 228 N.L.R.B. 808, 810 (1977) (Murphy, Chr., concurring).

229. *Id.* at 811. In making this distinction, Chairman Murphy relied on the following language from Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956): "The two policies are complementary. They depend for their foundation upon assurance of full freedom of association. Only after that is assured can the parties turn to effective negotiation as a means of maintaining the normal flow of commerce and . . . the full production of articles and commodities . . . ."

but the Board's duty to protect freedom of association makes deferral inappropriate when the unfair labor practice involves individual rights.[230] In addition to this perceived statutory dichotomy, Chairman Murphy felt it inappropriate "on principle" for arbitrators as private adjudicators to decide public rights issues. She argued that individual employees have too little control over the process and that arbitrators lack the power to properly decide statutory issues. She was also concerned about the degree of compromise inherent in normal grievance processing and the impossibility of processing each grievance to arbitration.

Chairman Murphy's position in *General American Transportation*, however, reflects an overly narrow view of the statute, its purpose, and the role of the Board. As explained earlier,[231] the legislative history and judicial interpretation make it clear that the statute was designed to permit employees to help themselves through collective action. Congress intended that individual employees would secure a wide range of employment rights through the bargaining success of their majority representative. These rights include not only improvements in economic benefits and working conditions but the right to fair treatment as individual human beings.[232] From the beginning, the Board's major role has been to protect the free choice of employees in selecting a collective bargaining representative. This conclusion is borne out by the substantial portion of the Board's caseload that is devoted to representation disputes[233] as well as by the bulk of the Board's unfair labor practice work that deals with pre-agreement conduct.[234]

After the agreement is in place, collective bargaining supplies and enforces a panoply of employee rights.[235] In this context, "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association" are merely two sides of the same coin.[236] Any shift in emphasis is primarily related to the stage of the collective bargaining process in which the issues arise. During the selection phase, the Board's role is exclusive and no question of deferral arises, since there is no collective bargaining agreement to which the Board can defer. After agreements are in place, the Board must continue to address representation questions and protect the collective bargaining process. But as long as the process is working as intended by Congress, issues of individual rights should be handled by the parties' private system.[237]

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230. General Am. Transp. Corp., 228 N.L.R.B. 808, 811–12 (1977) (Murphy, Chr., concurring) ("Since genuine collective bargaining cannot take place until the employees' full freedom of association is assured," the Board must resolve the dispute when individual freedoms included in § 7 of the Act are at stake.).

231. *See supra* notes 160–81 and accompanying text.

232. *See supra* notes 160–71 and accompanying text.

233. *See* 47 NLRB ANN. REP. 260 (1982) (showing that of the 46,373 cases received by the Board during fiscal year 1982, 8,276 (17.8%) were representation cases).

234. *See supra* note 187.

235. The typical collective bargaining agreement accords employees a far broader scale of protection than the NLRA. *See supra* notes 70–72 and accompanying text.

236. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1982). *See also* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956) (explaining that the two policies referred to in § 1 of the Act are complementary).

237. *See* Boys Mkts. Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 251 (1970); Mastro Plastics Corp., 350 U.S. 270, 280 (1956). *See also* S. REP. No. 105, 80th Cong., 1st Sess. 23 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, at 429 (1985), in which it was stated:

It is the purpose of this bill to encourage free-collective bargaining; it would not be conducive to that objective

Two other criticisms of Chairman Murphy's position bear mentioning. In both *General American Transportation* and *Robinson*, decided on the same day, Chairman Murphy affirmed the *Collyer* rationale.[238] The *Collyer* rationale, however, is inconsistent with the position Chairman Murphy took in *General American Transportation*.[239] The *Collyer* decision was based on the need to accommodate both the policy favoring voluntary settlement of labor disputes and the Board's jurisdiction to prevent and remedy unfair labor practices. When collective bargaining possesses the stability and suitability to resolve the dispute, when there is no hostility to individual employee rights, and when the parties are willing to use their settlement procedures, these policies are best accommodated by deferral.[240] *Collyer* did not say that *only* contract interpretation cases are suitable for resolution through grievance arbitration; it only held that such cases are suitable for such resolution. It does not follow that cases involving adverse employer actions, such as those allegedly lacking "just cause," would not be equally suited for arbitration under the *Collyer* rationale.

Secondly, Chairman Murphy maintained that deferral is inappropriate in individual rights cases while simultaneously professing a belief "that deferral to an arbitrator's award is appropriate under the *Spielberg* guidelines where all of the parties, including the affected employee, have voluntarily submitted their dispute to the arbitrators."[241] Yet a decision by the Board to defer under *Spielberg* means the Board has concluded that the grievance-arbitration procedure fairly resolved the unfair labor practice issue; the private system properly considered the individual employee's statutory rights; the arbitrator had sufficient authority to consider the unfair labor practice issue; and the private system successfully protected public rights.[242] Without substantial evidence to the contrary, the *Collyer* majority simply refused to hold a priori that the parties' grievance-arbitration procedure would not resolve the dispute consistently with *Spielberg*. Thus, supporting *Spielberg* deferral runs counter to rejecting *Collyer* deferral in individual rights cases.[243]

Because Chairman Murphy supports *Spielberg*, her argument essentially is an objection to forcing individual employees to submit to a process to which they

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if the Board became the forum for trying day-to-day grievances or if in the guise of unfair labor practice cases it entertained damage actions arising out of breach of contract. Hence the committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration, or if necessary by litigation in court.

Issues of individual rights arising under the Landrum-Griffin Act, however, are handled by the Court. *See supra* note 170 and accompanying text.

238. *See* General Am. Transp. Corp., 228 N.L.R.B. 808, 810 (1977) (Murphy, Chr., concurring); Robinson, 228 N.LR.B. 828 (1977).

239. For a repudiation of Chairman Murphy's view of *Collyer*, see Alleyne, *Arbitrators and the NLRB: The Nature of the Deferral Beast*, 4 INDUS. REL. L.J. 587, 594–600 (1981).

240. *See* Collyer Insulated Wire, 192 N.L.R.B. 837 (1979).

241. General Am. Transp. Corp., 228 N.L.R.B. 803, 813 (1977) (Murphy, Chr., concurring).

242. *See supra* notes 85–91 and accompanying text.

243. For examples of similar inconsistencies, see Collyer Insulated Wire, 192 N.L.R.B. 837, 846 (1971) (Fanning, Mem., dissenting); National Radio Co., 198 N.L.R.B. 527, 532–36 (1972) (Fanning & Jenkins, Mems., dissenting) (calling the Board's *Collyer* decision a reversal of *Spielberg*, since no award was required and the "fact or regularity" of the arbitration need not be considered). Far from a reversal of *Spielberg*, however, *Collyer* and *National Radio* simply postpone *Spielberg* review.

supposedly have never agreed.[244] Yet the reality is that individual employees elect the majority representative and vote on the ratification of contractual provisions, including grievance-arbitration procedures. Under the system of majority rule, the individual has a voice in selecting the representative and the programs that will bind all members of the unit. Requiring individual employees to use procedures that have been selected in individual rights cases is not different from requiring the union to use such procedures in contract interpretation cases.

Moreover, requiring unwilling individuals to use contractual procedures is consistent with national labor policy. Under our system of collective bargaining, individual employees experience both the benefits and burdens of the collective process. Congress has chosen to protect individuals from the imperfections of the collective bargaining system in a variety of ways, including Board determined units, the bill of rights for union members, the right not to join a union, the right to present grievances, a duty to bargain only with respect to "mandatory" subjects, and the duty of fair representation.[245]

2. *Grievance-Arbitration Is Not Designed or Competent to Protect Statutory Rights*

A second objection to deferral is simply that arbitration does not adequately protect individuals. Some courts and commentators lament the trade offs that characterize collective bargaining negotiations, adding that unions may fail to vigorously protect individual rights without violating the duty of fair representation.[246] Compromise is certainly a dominant feature of contract negotiations, and unions are given great latitude in striking reasonable accommodations of the many interests they represent.[247] To a lesser degree, compromises also occur during grievance processing, but these agreements are more strictly scrutinized by the courts in light of the union's duty of fair representation.[248] Congress, however, intended collective bargaining, with all of its strengths and weaknesses, to create and preserve the employment rights of individuals. To the extent the critics' argument that unions can fail to protect individual rights without violating the duty of fair representation is persuasive, it undercuts the entire collective bargaining system.[249]

A similar but less expansive attack is that arbitration is not well-suited to resolve unfair labor practice issues because of the limited competency and authority of arbitrators as well as the procedural deficiencies of the arbitration process itself.[250]

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244. *But see* National Radio Co., 198 N.L.R.B. 527, 533 (1977) (Fanning & Jenkins, Mems., dissenting) (arguing that § 9(a) of the Act gives employees a right to submit grievances outside the grievance procedure).

245. *See* Emporium Capwell v. Western Addition Community Org., 420 U.S. 50 (1975). *See generally* A. Cox, D. Bok, & R. Gorman, *supra* note 163, at 381–82.

246. *See* United Technologies Corp., 268 N.L.R.B. 557, 563 (1984) (Zimmerman, Mem., dissenting); Taylor v. NLRB, 786 F.2d 1516, *reh'g denied*, 794 F.2d 657 (11th Cir. 1986).

247. *See* Harper & Lupu, *Fair Representation as Equal Protection*, 98 Harv. L. Rev. 1212 (1985); Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. Pa. L. Rev. 251 (1977).

248. *See* Summers, *supra* note 247.

249. *See* Emporium Capwell v. Western Addition Community Org., 420 U.S. 50 (1975); Summers, *supra* note 247.

250. *See, e.g.*, Taylor v. NLRB, 786 F.2d 1516, *reh'g denied*, 794 F.2d 657 (11th Cir. 1986); United Technologies

This criticism, however, is unfounded. First, arbitrators are a highly educated group of professionals representing a variety of fields including "professors, lawyers, judges, public office holders, ministers, accountants, economists, and professional arbitrators."[251] Surveys indicate that a majority have law degrees and a substantial minority have graduate degrees.[252] Second, arbitrators who are most acceptable to unions and employers have many years of experience in the field.[253] Finally, the majority of cases decided by arbitrators are discipline and discharge cases, in which the grievances may involve statutory issues.[254] Thus, arbitrators have the acumen and experience to decide individual rights issues referred to them under the Board's current deferral policy. Moreover, recent writings suggest that the community of arbitrators is aware of the special statutory implications of arbitral decisions.[255]

Furthermore, deferral under *Olin* and *United Technologies* is designed to occur only when the arbitrator has authority to resolve the unfair labor practice aspects of the dispute.[256] In addition, pre-arbitral cases are not deferred unless contractual provisions are broad enough to encompass the unfair labor practice dispute.[257] Arbitration awards in post-settlement cases only pass muster if the contractual and statutory issues are factually parallel and evidence relevant to the unfair labor practice has been presented.[258] Since the Board will decide whether the statutory and contractual issues are properly coextensive, the arbitrator need concentrate only on

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Corp., 268 N.L.R.B. 557, 563 (1984) (Zimmerman, Mems., dissenting); Levy, *supra* note 150, at 383–85; Vause, *supra* note 150.

251. *See* F. ELKOURI & E. ELKOURI, *supra* note 60, at 138.

252. *See Tabulations & Computations Made from the Committee's Questionnaire*, 1976, 29 PROC. OF NAT'L ACAD. ARB. 376, 376–82 (1976) [hereinafter cited as *Tabulations & Computations*]; Herrick, *Profile of a Labor Arbitrator*, 37 ARB. J. 18 (1982); Sprehe & Small, *Members and Nonmembers of the National Academy of Arbitrators: Do They Differ?*, 39 ARB. J. 25 (1984); Zirkel, *The Use of External Law in Labor Arbitration: An Analysis of Arbitration Awards*, 1985 DET. C.L. REV. 31 (1985).

253. *See Tabulations & Computations supra* note 252, at 377; Zirkel, *supra* note 252, at 38. *See also* Stephenson v. NLRB, 550 F.2d 535, 538 n.4 (9th Cir. 1977) (recognizing the education and experience of arbitrators and conceding that arbitrators have superior competence in contract interpretation matters and equal competence in making factual determinations).

254. *See* FEDERAL MEDIATION & CONCILIATION SERVICE AUTOMATED INFORMATION SYSTEMS ARBITRATION STATISTICS FISCAL YEAR 1985; Zirkel, *supra* note 252, at 40.

255. *See, e.g.*, Mack & Bernstein, *NLRB Deferral to the Arbitration Process: The Arbitrator's Demanding Role*, 40 ARB. J. 33 (1985); McKelvey, *The Duty of Fair Representation: Has the Arbitrator a Responsibility?*, 41 ARB. J. 51 (1986); Rabin, *Fair Representation in Arbitration*, in THE CHANGING LAW OF FAIR REPRESENTATION 178–80 (J. McKelvey ed. 1985).

256. *See supra* notes 108–11, 142–45 and accompanying text. On the debate over whether arbitrators should decide questions of external law, see Brown, *The National Labor Policy, the NLRB, and Arbitration*, 21 PROC. OF NAT'L ACAD. ARB. 83 (1968); COX, *The Place of Law in Labor Arbitration*, 6 PROC. OF NAT'L ACAD. ARB. 76 (1953); Edwards, *Labor Arbitration at the Crossroads: The Common Law of the Shop v. External Law*, 32 ARB. J. 65 (1977); Feller, *The Impact of External Law upon Labor Arbitration*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 83 (B. Aaron ed. 1976); Feller, *The Coming End of Arbitration's Golden Age*, 29 PROC. OF NAT'L ACAD. ARB. 97, 125–26 (1976); Jones, *The Role of Arbitration in State and National Labor Policy*, 24 PROC. OF NAT'L ACAD. ARB. 42 (1971); Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267 (1980); Meltzer, *Ruminations about Ideology, Law, and Labor Arbitration*, 20 PROC. OF NAT'L ACAD. ARB. 1 (1967); Mittenthal, *The Role of Law in Arbitration*, 21 PROC. OF NAT'L ACAD. ARB. 42 (1968); St. Antoine, *supra* note 69; Sovern, *When Should Arbitrators Follow Federal Law?*, 73 PROC. OF NAT'L ACAD. ARB. 29 (1970).

257. Many contracts specifically forbid statutory violations, thereby giving arbitrators the authority to decide external law issues. *See* Mittenthal, *supra* note 256, at 43. For deferral standards relating to the necessary scope of the contract, see United Technologies Corp., 268 N.L.R.B. 557, 560 (1984); Olin Corp., 268 N.L.R.B. 573, 574 (1984).

258. *See* Olin Corp., 268 N.L.R.B. 573, 574 (1984).

resolving the contractual issues fairly. This is precisely the extent of the arbitrator's authority and responsibility under the contract.

Critics cite as additional arbitral shortcomings the lack of judicial formalities, such as rules of evidence and stenographic records, discovery, subpoena powers, clear burdens of proof, regard for precedent, and counsel.[259] Yet informality has been frequently cited as the strength of arbitration and modern arbitration is often criticized in other forums as becoming too formal.[260] Today, the typical arbitration proceeding approaches the formality of a Board proceeding.[261] For instance, neither the Board nor arbitration has the pre-hearing discovery that is customary in civil courts.[262] Subpoenas are issued by the Board and arbitrators, but court enforcement is necessary in both instances.[263] Arbitral burdens of proof are well-defined and are dependent upon the type of case.[264] While arbitrators are not required to follow precedent and are expected to apply the parties' terms and not those of another contract, they generally seek guidance from and indeed often follow other awards.[265] Although not required, counsel frequently appear on behalf of parties in arbitration as well as in Board proceedings.[266] The Voluntary Labor Arbitration Rules of the American Arbitration Association show that due process is contemplated for all arbitration participants.[267] Empirical data suggest that charging parties, especially individuals, often fare better in grievance arbitration than they would have before the Board.[268]

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259. *See, e.g.*, Summers, *supra* note 60, at 130 (arguing that relaxation of formalities turns to total collapse when the arbitration lacks a neutral party).

260. *See, e.g.*, Raffaele, *Lawyers in Labor Arbitration*, 37 ARB. J. 14 (1982).

261. *See* Nolan & Abrams, *The Future of Labor Arbitration*, 37 LAB. L.J. 437 (1986); Alleyne, *supra* note 239, at 596 (arguing that Board and arbitration proceedings are quite similar). Rules adopted by the American Arbitration Association provide for notice, representation by counsel, stenographic record, attendance at hearing by interested parties, the administering of an oath, the taking of evidence, full opportunity for the presentation of proof, and other procedural guarantees. AMERICAN ARBITRATION ASSOCIATION: VOLUNTARY LABOR ARBITRATION RULES; ¶¶ 19–22, 24, 28–29 (1965).

Moreover, Board hearings also lack formality. The ALJ is not robed, the cases need not be presented by an attorney, and the rules of evidence are not strictly followed.

262. *See* Comment, *NLRB Discovery After* Robbins: *More Peril for Private Litigants*, 47 FORDHAM L. REV. 393 (1978); Comment, *NLRB Discovery Practice: The Applicability of the Discovery Provision of the Federal Rules of Civil Procedure*, 1976 B.Y.U. L. REV. 845.

263. *See* National Labor Relations Act §11(1), (2), 29 U.S.C. §161(1), (2) (1982); F. ELKOURI & E. ELKOURI, *supra* note 60, at 305–08.

264. *See* F. ELKOURI & E. ELKOURI, *supra* note 60, at 324, 614–17, 661. *See also* Levy, *supra* note 150, at 379 (the requirement that employers must prove "just cause" in discipline and discharge cases gives employees more protection).

265. *See* Rehmus, *Writing the Opinion*, in ARBITRATION IN PRACTICE 209, 219–21 (A. Zack ed. 1984).

266. *See* A. COX, D. BOK, & R. GORMAN, *supra* note 163, at 106.

267. *See* AMERICAN ARBITRATION ASSOCIATION: VOLUNTARY LABOR ARBITRATION RULES, ¶¶ 20 (representation by counsel), 21 (stenographic record), 22 (attendance at hearings), 23 (adjournments), 26 (order of proceedings), 28 (evidence)(1965). *See also id.* at ¶ 26 ("The Arbitrator may, in his discretion, vary the normal procedure under which the initiating party first presents its claim, but in any case shall afford full and equal opportunity to all parties for presentation of relevant proofs.").

Many of these due process procedures are required even when arbitration lacks a neutral party. *See* Miller, *Teamster Joint Committees: The Legal Equivalent of Arbitration*, 37 PROC. OF NAT'L ACAD. ARB. 118, 119 (1984).

268. *See* Wolkinson, *The Impact of the* Collyer *Policy of Deferral: An Empirical Study*, 38 INDUS. & LAB. REL. REV. 377 (1985); Alleyne, *supra* note 239, at 593–96 (1981).

3. *Deferral Improperly Shifts Board Jurisdiction to Arbitration Without Adequate Oversight*

Opponents have argued that "deferral amounts to an abdication by [the Board] of its obligation under Section 10(a) of the Act to protect employees' rights and the public interest by preventing and remedying unfair labor practices."[269] Many of these critics endorse pre-settlement deferral under *Collyer* when the unfair labor practice hinges on contract interpretation, and post-settlement deferral when the award meets *Spielberg* standards.[270] In pre-settlement contract interpretation cases, the Board seeks guidance from an arbitrator's interpretation of contractual provisions that are relevant to the alleged unfair labor practice. In post-settlement cases, the Board may approve arbitration under a repugnancy standard without necessarily agreeing with the result.[271]

Under *Olin*, the Board reviews the same category of cases it did before that decision. And *United Technologies* properly gives the grievance procedure the first chance to resolve *all* suitable disputes.[272] Thus, the degree of oversight retained by the Board under *Spielberg* and *Olin*, particularly if the proposals made here are included, encourages collective bargaining while insuring proper supervision.[273]

4. United Technologies *and* Olin *Do Not Go Far Enough*

Judge Harry T. Edwards argues that the Board's *Olin* and *United Technologies* decisions are properly directed toward limited review of arbitration awards but are "grounded on a faulty rationale."[274] He believes that with few exceptions "when the parties negotiate a collective bargaining agreement and stipulate that they will arbitrate disputes arising under it, they have waived many of their statutory rights under the NLRA . . . [and that] [t]he parties' agreement, in essence, supplants the statute as the source of many employee rights . . . ."[275] For Judge Edwards, arbitral awards should not be reviewed even for factual parallelism or for evidence relating to the unfair labor practice issue.[276] Rather, the award should stand unless either its essence is not drawn from the contract or the contract itself is illegal, a narrower standard than the *Olin/Spielberg* "repugnancy" test.[277] Judge Edwards acknowledges that certain issues are nonwaivable and thus exempts cases involving the duty

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269. Olin Corp., 268 N.L.R.B. 573, 579 (1984) (Zimmerman, Mem., dissenting). *See also* Levy, *supra* note 150, at 374.

270. *See, e.g.*, United Technologies Corp., 268 N.L.R.B. 557, 564 (1984) (Zimmerman, Mem., dissenting); Morris, *supra* note 150, at 299.

271. *See* Professional Porter & Window Cleaning Co., 263 N.L.R.B. 136, 138 n.8 (1982).

272. "Suitability" is determined by the nature of the issues and the scope of the contract. As cases after *Olin* and *United Technologies* indicate, the Board does not deem representation, information, and § 8(a)(4) issues to be "suitable." Cases also indicate that the Board takes seriously the "scope" issue in both the pre- and post-arbitral contexts. *See infra* notes 307–61 and accompanying text.

273. *See infra* notes 377–429 and accompanying text.

274. Edwards, *supra* note 150, at 28.

275. *Id.*

276. *Id.* at 29–30.

277. *Id.* at 31, 39.

of fair representation and individual rights that do not depend on contract interpretation.[278]

Yet the "waiver" theory is not useful in analyzing most of the cases that are controversial under the Board's new deferral pronouncements. Contracts generally do not waive an individual's right to be free from unlawful discrimination and coercion.[279] Rather, contracts expand such freedom to include any adverse treatment without "just cause."[280] Thus, statutory rights are augmented rather than displaced by the typical collective bargaining agreement. Moreover, the Board retains responsibility for assuring that statutory rights are not lost in this expansion.[281]

Judge Edwards' proposal envisions identical reviewing functions by the Board and courts when arbitral awards resolve contractual disputes.[282] Eliminating cases involving individual noncontractual rights and the duty of fair representation, Judge Edwards argues that since the collective bargaining agreement supplants many statutory rights and since the arbitrator's decision is part of the contract, the Board's inquiry should be limited to whether the contract as interpreted is illegal.[283] This position, however, overlooks the different purposes of judicial and Board review. Courts reviewing arbitration awards under section 301 of the Act are primarily concerned with protecting the intent of the parties and preserving the integrity of the legal system. The Board, on the other hand, is primarily concerned with protecting the collective bargaining process. While courts inquire as to whether the parties' intent is undermined, the Board questions the effect of conduct on collective bargaining.[284]

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278. *Id.* at 28, 31, 34. The two cases principally relied upon by Judge Edwards, Fournelle v. NLRB, 670 F.2d 331 (D.C. Cir. 1982), and American Freight Sys., Inc. v. NLRB, 722 F.2d 828 (D.C. Cir. 1983), are individual rights cases that turn on contract interpretation.

On the waiver issue, see generally Harper, *Union Waiver of Employee Rights Under the NLRA: Part I*, 4 INDUS. REL. L. J. 335 (1981); and Harper, *Union Waiver of Employee Rights Under the NLRA: Part II: A Fresh Approach to Board Deferral to Arbitration*, 4 INDUS. REL. L.J. 680 (1981).

279. Typically, collective bargaining agreements contain due process protections against discharge or discipline without "just cause." This protection is, therefore, not limited to employer actions motivated by antiunion sentiments. *See* CBNC, *supra* note 56, at 40:1–303.

280. A recent study indicates that 86% of the collective bargaining agreements surveyed contained "just cause" provisions protecting employees against unreasonable employer conduct. *See* CBNC, *supra* note 56, at 40:1. Other frequently occurring provisions protecting individual rights in the workplace were disciplinary systems, grievance procedures, lay-off provisions, seniority provisions, and provisions relating to promotion, demotion, and transfer. *Id.* at 40:1, 51:1, 60:1, 75:1, 68:1.

281. *Cf.* Harper, *Union Waiver of Employee Rights Under the NLRA: Part II: A Fresh Approach to Board Deferral to Arbitration*, 4 INDUS. REL. L.J. 680 (1981) (arguing that the Board's decision not to exercise jurisdiction rests on the premise that the Board's protection is at least partially waived by the union through the establishment and use of a grievance procedure). Professor Harper's view overlooks the fact that waiver and deferral present fundamentally different questions. The waiver issue concerns the extent to which the majority representative can sacrifice individual statutory rights in order to secure collective benefits. The deferral issue involves the extent to which collective bargaining can be relied upon to resolve the entire dispute, including unfair labor practice allegations.

Statutory rights exist for the purpose of securing collective bargaining. Once those protections have been secured, these rights continue to have vitality only to assure that the collective bargaining process functions as Congress intended. After a collective bargaining agreement has been reached, the Board's exercise of jurisdiction is triggered only by fundamental questions of representation, the threatened integrity of either the collective bargaining process or the Board's enforcement machinery, or collective bargaining's inability to handle the dispute.

282. *See* Edwards, *supra* note 150, at 27–32.

283. *Id.* at 31, 36.

284. Pursuant to its statutory role, the Board must be alert for procedural maladies such as the refusal to supply information, representational unfairness and procedural irregularity, instability in the collective bargaining relationship,

For example, in *Metropolitan Edison Co. v. NLRB*,[285] the company and union agreed upon a no-strike clause and a conventional grievance procedure.[286] Union members participated in an unlawful work stoppage, and the company disciplined the local union officials more harshly than other strike participants. The arbitrator denied a union official's grievance, finding that the official had "an *affirmative duty* to protect the authority of the Union leadership from illegitimate action on the part of employees, and to uphold the sanctity of the Agreement and its established grievance procedures."[287]

Since this award does not violate the law or public policy and is a plausible reading of the contract, it should be enforced by the courts.[288] On the other hand, discrimination against union officials based solely on their union status would undermine a union's ability to bargain with the employer.[289] Thus, an arbitral award permitting such discrimination in the absence of a "waiver" would threaten the bargaining process and would properly be deemed "repugnant."[290] In its supervisory role, the Board should refuse deferral and hear such a case de novo.[291] The coexistence of the Board's duty to protect collective bargaining and the statutory policy favoring collective bargaining require an oversight of the grievance procedure by the Board that is not shared by courts in contract enforcement actions.

5. *Negation of the Mid-Term Duty to Bargain—or De Facto Waiver*

The duty to bargain under the NLRA is a dual obligation to meet and confer in good faith and to refrain from making unilateral changes in terms and conditions of employment without first bargaining to impasse.[292] This twin duty continues during

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and inadequate contractual scope. Settlements may be repugnant as a result of their potential impact on collective bargaining. In individual rights cases, the concern for the integrity of collective bargaining can be met by insuring that arbitration is capable of addressing the issue.

285. 460 U.S. 693 (1983).

286. The clause read as follows:

> The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public.

Id. at 695.

287. *Id.* at 696 n.2 (emphasis in original).

288. *See* W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983).

289. *See* Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 702–04 (1983) (upholding the Board's view that the discriminatory suspension of the local union president was "inherently destructive" of employee rights).

290. *See, e.g.*, John Morrell & Co., 270 N.L.R.B. 1 (1984).

291. Judge Edwards would not defer when the contract is illegal, because "no public policy is served by allowing arbitrators to enforce illegal contracts." Edwards, *supra* note 150, at 31. Similarly, no public policy is served when awards generally violate the policies and purposes of the Act. It is therefore appropriate for the Board to review arbitration awards for repugnancy.

292. *See* National Labor Relations Act § 8(a)(5), (b)(3), 29 U.S.C. § 158(a)(5), (b)(3) (1982). For text of these provisions, see *supra* note 30. Section 8(d) of the Act also provides as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . . .
>
> [T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract . . . .

National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1982).

the term of a collective bargaining agreement, primarily through the processing of disputes under the parties' grievance and arbitration procedures.

A majority of the Board in *Jacobs Manufacturing Co.*[293] interpreted subsection 8(d) of the Act as requiring the parties to bargain about mandatory subjects that were not part of the agreement reached by the parties upon executing the contract. The Board considered matters which were fully discussed or consciously explored during negotiations to be a part of the bargain, even though not explicitly addressed in the agreement.[294] Thus, *Jacobs* would prevent an employer from making mid-term unilateral changes in undiscussed mandatory bargaining subjects without first bargaining to impasse with the union. On the other hand, if the contract authorizes an employer to take unilateral action or if the union specifically waives its right to bargain on a subject, the employer may unilaterally change the terms and conditions of employment.[295]

One Board member argued in dissent that the majority rule in *Jacobs* undermines the collective bargaining process, since written agreements reflect both expressed and unexpressed concessions and trade offs.[296] The Board member urged that it is inconsistent with this process and the stability produced by collective bargaining to permit either party to continually demand alteration of settled rights and obligations under the contract. The better rule, in his view, would treat the collective bargaining agreement as obligating the parties to continue the status quo during the term of the contract and as permitting only those unilateral changes that are authorized by the contract.[297]

It has been suggested that deferral has been used as a substitute for the "waiver" in subsection 8(a)(5) cases involving unilateral changes during the term of the agreement.[298] For example, changing the pre-settlement factual paradigm discussed above,[299] assume that the agreement contained no provision relating to subcontracting. The employer decided that it could reduce labor costs, lower the price of the product, and avoid losing its market share by subcontracting a portion of the work performed by the union employees. Without first discussing the matter with the

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293. 94 N.L.R.B. 1214 (1951).

294. *Id.*

295. *See* NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); Columbus & S. Ohio Elec. Co., 270 N.L.R.B. 686 (1984).

296. Jacobs Mfg. Co., 94 N.L.R.B. 1214, 1231–32 (1951) (Reynolds, Mem., concurring separately and dissenting in part).

297. *Id.* The theme articulated by the dissent in *Jacobs* was first articulated by Professors Cox and Dunlop.

> In our view the contracts incorporated an implied undertaking that the status quo would be continued for the duration of the contract except as the contract or some supplemental agreement might provide for a change. For either party to make a change, therefore, would violate this understanding as well as the prohibition against unauthorized unilateral action contained in sections 8(a)(5) and 8(b)(3).

Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1127 (1950). This theme has also been adopted in more recent scholarly commentary. *See* Peck, *supra* note 118, at 365:

> The *Jacobs* rule that there is a continuing duty to bargain during the term of an agreement provides a basis for continued involvement of the NLRB with the contractual relationship between the parties even though they have negotiated in good faith and reached an agreement which has its own dispute resolution procedures. This involvement fits uncomfortably with the well-established proposition that Congress did not intend the NLRB to serve as a forum in which suits might be brought for breach of contract.

298. *See* Peck, *supra* note 118, at 367.

299. *See supra* notes 117–18 and accompanying text.

union, the employer subcontracts the work and, in response, the union files a grievance under the contract and a charge under subsection 8(a)(5) of the Act. If subcontracting has not been discussed during pre-contract negotiations and is deemed a mandatory subject of bargaining by the Board,[300] the Board would hold this unilateral mid-contract change a violation of the statutory duty to bargain.

Under the grievance procedure, the issue would be whether the employer had the authority to subcontract the work without consulting the union, essentially the same issue to be decided by the Board.[301] Thus, the contract is sufficiently broad to resolve the statutory issue.[302] Since the charge is filed before the grievance procedure has produced a settlement, the Board should defer to the grievance procedures. If an arbitrator ultimately decides that the employer had authority under the contract to subcontract the work, the Board would decide under *Spielberg* and *Olin* whether to defer to the award.[303] If the Board deferred to the award, such a decision could be viewed as overruling *Jacobs* or finding a de facto waiver of the duty to bargain when the parties had expressed no such duty. A requirement of legal as well as factual parallelism as preconditions for deferral might be deemed necessary to resolve this perceived problem.

Under a general theory of deferral, however, the arbitrator's decision would be vulnerable to two attacks on *Spielberg* and *Olin* review. First, if the parties presented no evidence of the contractual language and negotiating history to show that the employer had express authority to subcontract work or that the matter was fully discussed, the arbitration would fail to meet the *Olin* test of adequate consideration.[304] The arbitrator would not have been presented with facts generally relevant to the unfair labor practice charge. Accordingly, the General Counsel should be able to show the procedure's failure to demonstrate a fair collective bargaining solution. Second, the arbitrator's award may be deemed repugnant to the Act. If the subcontracting involved a substantial amount of unit work, the General Counsel might easily establish that the employer's conduct as condoned by the arbitral award threatened collective bargaining.[305]

This analysis demonstrates that the Board does not negate the duty to bargain during the term of a collective bargaining agreement by its deferral policy in

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300. *See* Otis Elevator, 269 N.L.R.B. 891 (1984).

301. *See* C & C Plywood Corp., 385 U.S. 421 (1967).

302. If the contract specifically removed the issue of subcontracting from the grievance procedure, the Board's pre-deferral analysis would result in a decision not to defer since the express terms of the contract would reveal the grievance procedure as incapable of resolving the statutory issue.

303. In the absence of any provision on subcontracting, the arbitrator's decision on the employer's contractual authority may depend upon the arbitrator's view of management rights. If the arbitrator believes that management retains all prerogatives not specifically limited by the agreement, she will deny the grievance. On the other hand, if she believes that management shares power over the terms and conditions of employment with its employees as represented by the union, she may find that the employer is without authority to subcontract unit work without bargaining with the union. *Compare* Phelps, *Management's Reserved Rights: An Industry View*, 9 PROC. OF NAT'L ACAD. ARB. 102, 105–07 (1956) *with* Killingsworth, *The Presidential Address: Management Rights Revisited*, 22 PROC. OF NAT'L ACAD. ARB. 1, 3–13, 18–19 (1969).

304. *See supra* notes 108–11 and accompanying text.

305. For an exemplary fact situation, see Rappazzo Elec. Co., 281 N.L.R.B. No. 75, 124 L.R.R.M. (BNA) 1299 (Sept. 16, 1986).

subsection 8(a)(5) cases. Nor are legal and factual parallelisms necessary for a deferral policy to be consistent with the Board's statutory mandate. Deferral simply seeks to give the parties' procedure the first opportunity to resolve the dispute. It neither absolves the Board of responsibility for deciding unfair labor practice cases nor precludes the Board from so doing. Because there are other reasons to refrain from holding the parties' contractual procedure accountable for the interpretation of external law, a standard of legal parallelism is inappropriate.[306] If the Board is faithful to the theory articulated in this Article, it will easily identify those cases that pose unacceptable risks to national labor policy.

III. THE IMPACT OF *UNITED TECHNOLOGIES* AND *OLIN*

Theoretically, *United Technologies*' extension of pre-settlement deferral to individual rights cases and *Olin*'s new "adequate consideration" and burden of proof rules further the certainty of deferral policy. They also seemingly advance the cause of collective bargaining, and permit the Board to responsibly carry out its statutory mandate. While these developments are consistent with the general theory of deferral articulated in this Article, the question remains: Have the decided cases since *United Technologies* and *Olin* lived up to this theoretical billing?

A. United Technologies' *Progeny*

Since the *United Technologies* decision the Board has decided fifty-three cases presenting fifty-seven pre-settlement deferral issues.[307] The Board deferred to the parties' grievance procedures on twenty-one of the fifty-seven issues.[308] These deferred cases involved typical allegations of individual threats and discrimination, unilateral changes, and refusals to bargain. None touched on the Board's non-deferrable responsibility. In each case, broad contractual provisions and a healthy relationship between the parties enabled collective bargaining to resolve the dispute fairly.[309] In addition, the decision to defer was made only when the alleged conduct of the parties did not threaten the collective bargaining process.[310]

The Board decided not to defer on thirty-six of the fifty-seven issues. The largest number of decisions against deferral involved an employer's failure to disclose information necessary either for grievance processing or for performing the representational function,[311] followed by cases dealing with inadequate contractual

306. *See* Feller, *supra* note 256; St. Antoine, *supra* note 69.

307. Appendix I summarizes these decisions and explains the cases in which the Board declined to defer.

308. *See* Appendix I and decisions cited therein.

309. *See, e.g.*, Carolina Freight Carriers Corp., 281 N.L.R.B. No. 69, 123 L.R.R.M. (BNA) 1342 (1986).

310. *Cf.* Rappazzo Elec. Co., 281 N.L.R.B. No. 75, 124 L.R.R.M. (BNA) 1299 (Sept. 16, 1986).

311. *See* E.W. Buschman Co., 277 N.L.R.B. No. 21, 120 L.R.R.M. (BNA) 1253 (Oct. 31, 1985); United States Postal Serv., 276 N.L.R.B. 1282 (1985); Clinchfield Coal Co., 275 N.L.R.B. 1384 (1985); O. Voorhees Painting Co., 275 N.L.R.B. 779 (1985); General Dynamics Corp., 270 N.L.R.B. 829 (1984); General Dynamics Corp., 268 N.L.R.B. 1432 (1984).

scope,[312] retaliation for using Board processes,[313] concerns for administrative economy,[314] and rejection of collective bargaining.[315] In several cases deferral was not requested by either party[316] or an unlawful contractual provision was involved.[317] The Board also declined to defer cases involving a representation question,[318] a conflict of interest between an aggrieved employee and both union and management,[319] and a Board settlement that did not refer the parties to their grievance procedure.[320] These decisions are consistent with the Board's exclusive role of defining the structure of collective bargaining, insuring employee freedom of choice, and defending its own jurisdiction. They also reveal a supervisory role, in which the Board intervenes only to protect the integrity of the collective bargaining process and to hear the dispute when the parties' process is incapable of resolving it.

By not deferring in cases involving an alleged failure to supply relevant information, the Board has attempted to guarantee that successful private settlement will not be hampered by unequal access to information. The most dramatic example of the Board's recognition of the link between successful private settlement and access to information is *Clinchfield Coal Co.*[321] In that case, the ALJ refused to defer the information issue to arbitration and held that the union had waived the right to request such information in clear contractual language.[322] The Board affirmed the ALJ's deferral decision, but reversed the waiver holding. The Board found that the contractual language relied upon by the ALJ did not constitute a "clear and unmistakable" waiver.[323] In a holding that reflected a more liberal approach to

312. *See* Shopmen's Local 539, 278 N.L.R.B. No. 24, 122 L.R.R.M. (BNA) 1043 (Jan. 22, 1986); Amoco Oil Co., 278 N.L.R.B. No. 3, 121 L.R.R.M. (BNA) 1308 (Jan. 16, 1986); Local 702, IBEW, 274 N.L.R.B. 1292 (1985); IBEW Local 1316, 271 N.L.R.B. 338 (1984).

313. *See* Northern Cal. Dist. Council of Laborers, 275 N.L.R.B. 278 (1985); Roadway Express Inc., 274 N.L.R.B. 357 (1985); International Harvester Co., 271 N.L.R.B. 647 (1984).

314. *See* Coalite Inc., 278 N.L.R.B. No. 40, 122 L.R.R.M. (BNA) 1030 (Jan. 30, 1986); International Harvester Co., 271 N.L.R.B. 647 (1984); S.Q.I. Roofing, Inc., 271 N.L.R.B. 1 (1984).

315. *See* Santulli Mail Servs., Inc., 281 N.L.R.B. No. 170, 124 L.R.R.M. (BNA) 1158 (Oct. 17, 1986); Rappazzo Elec. Co., 281 N.L.R.B. No. 75, 124 L.R.R.M. (BNA) 1299 (Sept. 16, 1986); Hutchinson Fruit Co., 277 N.L.R.B. No. 54, 120 L.R.R.M. (BNA) 1258 (Nov. 15, 1985); Southwestern Bell Tel. Co., 276 N.L.R.B. 1053 (1985); Victor Block, Inc., 276 N.L.R.B. 676 (1985).

316. *See* Griffith-Hope Co., 275 N.L.R.B. 487 (1985); United States Postal Serv., 276 N.L.R.B. 1282 (1985); Manville Forest Prod. Corp., 269 N.L.R.B. 390 (1984).

317. *See* Sheet Metal Workers Local 208, 278 N.L.R.B. No. 87, 121 L.R.R.M. (BNA) 1276 (Feb. 21, 1986); UAW Local 1161, 271 N.L.R.B. 1411 (1984).

318. *See* Martin Marietta Chems., 270 N.L.R.B. 821 (1984).

319. *See* Hendrickson Bros., 272 N.L.R.B. 438 (1984).

320. *See* General Dynamics Corp., 268 N.L.R.B. 1432 (1984), in which the Board stated:

> Thus, the procedural issue of disclosure of the study is merely preliminary to the resolution of the parties' substantive dispute over the subcontracting. In these circumstances, we find no merit in encumbering the process of resolving the pending subcontracting grievances with the inevitable delays attendant to the filing, processing, and submission to arbitration of a new grievance regarding the information request. Such a two-tiered arbitration process would not be consistent with our national policy favoring the voluntary and expeditious resolution of disputes through arbitration. Nor would it be consistent with prior Board decision in this area.

Id. at 1432 n.2.

321. 275 N.L.R.B. 1384 (1985).

322. *Id.* at 1384.

323. *Id.*.

the waiver issue than it has shown in other recent cases,[324] the Board noted the importance of information in resolving substantive issues under the contract.[325]

Yet the Board has not imposed upon parties a burden that could not be sustained. It has exercised jurisdiction when the contract was not of sufficient scope to handle the statutory issues,[326] when the parties had not requested deferral,[327] and when their conduct manifested a rejection of the collective bargaining process.[328] In addition, the Board has not deferred when the alignment of interests created a substantial risk that the grievance procedure would be incapable of fairly resolving a dispute involving an individual.[329] The Board's primary and supervisory roles are simultaneously invoked when the contractual provision at issue is illegal, making arbitration useless and the Board's ruling on the issue unavoidable.[330]

Whether its role is exclusive or supervisory, the Board cannot fulfill its duties of creating the appropriate structures for collective bargaining or of protecting and reinforcing the collective process if it does not defend itself against the undermining of its processes by employers or unions. In such cases the Board must take jurisdiction to protect its statutory concerns, a fact the Board reaffirmed shortly after *United Technologies*.[331] Similarly, the Board has exclusive responsibility to determine the best use of its resources. Thus, it has properly declined to defer when concerns for administrative economy warrant exercising jurisdiction.[332]

In sum, pre-arbitral decisions since *United Technologies* indicate that the Board has been sensitive to its dual function. It has exercised jurisdiction when necessary to implement the statutory design. It also exercised critical oversight of the collective bargaining process, stepping in when help was needed, but otherwise permitting the process to function as Congress intended.

B. Olin's *Progeny*

The Board's post-settlement deferral rate under *Spielberg* has shown a dramatic upswing since *Olin*, from thirty-four percent of the deferral cases considered by the Board during the three decades after *Spielberg* to sixty-seven percent of the cases

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324. *See, e.g.*, Indianapolis Power & Light, 273 N.L.R.B. 1715 (1985) (holding that a general no-strike clause waived the right of employees to honor stranger picket lines).

325. Clinchfield Coal Co., 275 N.L.R.B. 1384, 1385 n.4 (1985).

326. *See* Shopmen's Local 539, 278 N.L.R.B. No. 24, 122 L.R.R.M. (BNA) 1043 (Jan. 22, 1986); Amoco Oil Co., 278 N.L.R.B. No. 3, 121 L.R.R.M. (BNA) 1308 (Jan. 16, 1986); Local 702, IBEW, 274 N.L.R.B. 1292 (1985); IBEW Local 1316, 271 N.L.R.B. 338 (1984).

327. *See* cases cited *supra* note 316.

328. *See* Hutchinson Fruit Co., 277 N.L.R.B. No. 54, 120 L.R.R.M. (BNA) 1258 (Nov. 15, 1985); Southwestern Bell Tel. Co., 276 N.L.R.B. 1053 (1985); Victor Block, Inc., 276 N.L.R.B. 676 (1985).

329. *See* Hendrickson Bros., 272 N.L.R.B. 438 (1984).

330. *See* cases cited *supra* note 317.

331. *See* International Harvester Co., 271 N.L.R.B. 647, 647 (1984) (quoting Filmation Assocs., 227 N.L.R.B. 1721, 1721 (1977)) ("the duty to preserve the Board's processes from abuse is a function of [the] Board and may not be delegated to the parties or an arbitrator"). *See also* Roadway Express Inc., 274 N.L.R.B. 357 (1985); Northern Cal. Dist. Council of Laborers, 275 N.L.R.B. 278 (1985). *Cf.* Grand Rapids Die Casting Corp., 279 N.L.R.B. No. 93, 122 L.R.R.M. (BNA) 1212 (Apr. 29, 1986); Moses, *supra* note 150, at 234.

332. *See, e.g.*, International Harvester Co., 271 N.L.R.B. 647 (1984) (in which the Board considered a connected § 8(a)(3) claim when it refused to defer a § 8(a)(4) claim). *Accord* Coalite Inc., 278 N.L.R.B. No. 40, 122 L.R.R.M. (BNA) 1030 (Jan. 30, 1986); S.Q.I. Roofing Inc., 271 N.L.R.B. 1 (1984).

considered after *Olin*.[333] Forty-eight post-settlement deferral issues have been presented in the forty-seven cases decided since *Olin*.[334] The Board deferred to the grievance settlement or arbitration award in thirty instances. Of the eighteen issues not deferred, the largest number were reversed as repugnant to the Act.[335] The Board also declined deferral in cases involving representation questions,[336] procedural bars,[337] insufficient contractual scope,[338] no deferral request,[339] a nongrievance settlement,[340] insufficient evidence,[341] nonparallel contractual and statutory issues,[342] and alleged employer retaliation.[343]

As in pre-settlement deferral cases, the Board also has been vigilant in guarding against threats to the collective bargaining process posed by arbitral awards. In *Garland Coal & Mining Co.*,[344] the Board used a finding of "repugnancy" to strike down an award that would have prevented union officials from representing the legitimate interests of their constituency in collective bargaining. In that case, the employer suspended and discharged a union local president for refusing to sign an employer memorandum that denied the union's authority to represent a segment of the workforce. The arbitrator had upheld the employer's claim that the refusal constituted insubordination. Exhibiting an awareness of the central focus of its jurisdiction, the Board said: "While recognizing the importance of arbitration, the Board will, where necessary, vindicate the Federal interest by declining to defer to an arbitrator's award when it cannot be arguably reconciled with the policies of the Act."[345]

Like the pre-settlement cases, the post-settlement cases demonstrate the Board's concern about whether the parties to a collective bargaining agreement should be deciding the issue in question. Rejecting arbitral awards in *Port Chester Nursing Home*[346] and *Paper Manufacturers Co.*,[347] the Board reaffirmed its exclusive control over unit and representation questions.

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333. Between August 17, 1956, and January 21, 1986, 240 Board decisions cited *Spielberg*. The Board deferred in 81 (33.75%) of those cases. Significantly, 50 of the 81 cases deferred (70.3%) involved § 8(a)(1), 8(a)(3), 8(b)(1)(A), or 8(b)(1)(B) claims. *See also* Appendix II, summarizing the types of post-arbitration cases decided since *Olin*.

334. See cases summarized in Appendix II.

335. *See* Earl C. Smith, Inc., 278 N.L.R.B. No. 100, 121 L.R.R.M. (BNA) 1255 (Feb. 21, 1986); Garland Coal & Mining Co., 276 N.L.R.B. 963 (1985); 1115, Nursing Home & Hosp. Employees Union, 275 N.L.R.B. 272 (1985); Paper Mfrs. Co., 274 N.L.R.B. 491 (1985); John Morrell & Co., 270 N.L.R.B. 1 (1984).

336. *See* Paper Mfrs. Co., 274 N.L.R.B. 491 (1985) (in which the Board should have refused deferral because the cases involved a representation question, but found that the award was repugnant to the Act because of the arbitrator's handling of the unit question); Port Chester Nursing Home, 269 N.L.R.B. 150 (1984).

337. *See* Drummond Coal Co., 277 N.L.R.B. No. 177, 121 L.R.R.M. (BNA) 1140 (Jan. 13, 1986).

338. *See* Cotter & Co., 276 N.L.R.B. 714 (1985).

339. *See* Manville Forest Prod. Co., 269 N.L.R.B. 390 (1984).

340. *See* A.N. Electric Corp., 276 N.L.R.B. 887 (1985).

341. *See* Ryder/P.I.E. Nationwide, Inc., 278 N.L.R.B. No. 109, 122 L.R.R.M. (BNA) 1264 (Feb. 25, 1986); Wheeling-Pittsburgh Steel Corp., 277 N.L.R.B. No. 160, 121 L.R.R.M. (BNA) 1101 (Dec. 31, 1985); Superior Fast Freight, 275 N.L.R.B. 329 (1985).

342. *See* Aces Mechanical Corp., 282 N.L.R.B. No. 137, 124 L.R.R.M. (BNA) 1145 (Feb. 3, 1987); Toyota of San Francisco, 280 N.L.R.B. No. 93, 124 L.R.R.M. 1056 (1986); Superior Fast Freight, 275 N.L.R.B. 329 (1985).

343. *See* Ryder/P.I.E. Nationwide, Inc., 279 N.L.R.B. No. 28, 122 L.R.R.M. (BNA) 1048 (April 9, 1986).

344. 276 N.L.R.B. 963 (1985).

345. *Id.* at 965 (footnote omitted).

346. 269 N.L.R.B. 150 (1984) (involving a merger of two labor organizations).

347. 274 N.L.R.B. 491 (1985) (involving a question of the unit affiliation of employees transferred from a defunct to an existing plant).

In the post-settlement cases, the Board has also manifested a concern about whether the parties' grievance procedure was capable of fairly resolving the dispute. For example, the Board refused to defer in *Cotter & Co.*,[348] because the contract had no provision covering the dispute; in *Wheeling-Pittsburgh Steel Corp.*,[349] because the arbitrator did not adequately consider the unfair labor practice; and in *Drummond Coal Co.*,[350] because the arbitrator denied the grievance on procedural grounds rather than on the merits.

When the Board has deferred, its decisions represent a proper sensitivity to the administrative restraint contemplated by the statute, once collective bargaining agreements have been reached. For example, cases after *Olin* indicate that there are three alternative bases for avoiding a finding of repugnancy: (1) if the arbitrator's analytical approach is generally consistent with the Board's;[351] (2) if the arbitrator relies on the kinds of factors deemed consistent with labor-management practice;[352] or (3) if the ruling is consistent with Board precedent.[353] This "repugnancy" determination is based on the record findings of the arbitrator unless there are clear factual errors.[354] Similarly, if arbitral remedies are based on factors that are not inconsistent with the Act, the Board will not find an award repugnant simply because the arbitral remedy differs from remedies the Board has given in similar cases.[355] The Board recognizes the "flexibility of remedies [as] a major advantage of arbitration."[356] The Board also recognizes that pre-award settlements do not differ significantly from actual arbitration awards. As a result, the Board defers to such settlements under *Olin*.[357]

Moreover, the General Counsel cannot meet the burden of proving that the arbitrator has not adequately considered the unfair labor practice issue simply by showing that the decision reflects no consideration of the unfair labor practice issue

348. 276 N.L.R.B. 714 (1985).

349. 277 N.L.R.B. No. 160, 121 L.R.R.M. (BNA) 1101 (Dec. 31, 1985).

350. 277 N.L.R.B. No. 177, 121 L.R.R.M. (BNA) 1140 (Jan. 13, 1986).

351. *See* Ohio Edison Co., 274 N.L.R.B. 874 (1985) (upholding the suspension of two employees who honored a stranger picket line in the face of a clause that prohibited "cessation of any work of the Company." The Board held that the award was not clearly repugnant since the arbitration panel interpreted the waiver issue based on the no-strike clause—an approach consistent with the Board's, there was no showing that the panel decision was not "motivated by considerations irrelevant to labor-management relations," and the award was "not in conflict with the purposes and policies of the Act."); Altoona Hospital, 270 N.L.R.B. 1179 (1984) (when employee was discharged for giving confidential information to a private investigator, retained by the employee to investigate a grievance against the employer, the Board deferred to the arbitrator's award denying the grievance because the arbitrator balanced the legitimate interests of the employer in confidentiality against the protected right of the employee to process a grievance). *Accord* Combustion Eng'g, 272 N.L.R.B. 215 (1985); United States Postal Serv., 275 N.L.R.B. 430 (1985).

352. *See* Ohio Edison Co., 274 N.L.R.B. 874 (1985).

353. The Board will make every attempt to reconcile the arbitral award with statutory interpretation. *See, e.g.*, United Parcel Serv., Inc., 274 N.L.R.B. 396 (1985).

354. *See* Louis G. Freeman Co., 270 N.L.R.B. 80 (1984).

355. *See* Combustion Eng'g, 272 N.L.R.B. 215 (1984). *Cf.* Earl C. Smith, Inc., 278 N.L.R.B. No. 100, 121 L.R.R.M. (BNA) 1255 (Feb. 21, 1986) (the Board deemed repugnant an award that did not attempt to remedy a contractual breach that was also an unfair labor practice).

356. *See* Combustion Eng'g, 272 N.L.R.B. 215, 217 n.11 (1985).

357. *See* Griffith-Hope Co., 275 N.L.R.B. 487 (1985); Combustion Eng'g, 272 N.L.R.B. 215 (1985) (applying the *Spielberg* "fairness" standard by considering whether: each party made concessions; any coercion was present; attention is paid to whether the parties actually agreed; and the agreement resolved all the issues).

or by showing that there is no decision.[358] Under *Olin*'s burden of proof rule, the General Counsel loses in those cases.

In determining whether the arbitrator has adequately considered the unfair labor practice, the Board has made it clear that it will exercise only limited review. It will not require the arbitrator to make a specific finding that contractual and statutory issues are parallel,[359] nor will it require her to have authority under the contract to decide the unfair labor practice issue.[360] The Board only requires that the arbitrator be given a general factual presentation relating to the unfair labor practice issue.[361]

These cases reveal that the Board's approach has been consistent with and faithfully reflects the general theory of deferral set forth in section II of this Article. The Board has not deferred when the central focus of its jurisdiction was implicated or when the collective bargaining process was threatened. Nor has it deferred when the contractual procedure was incapable of resolving the entire dispute. The Board has deferred, however, in cases in which collective bargaining appeared capable of resolving fairly the unfair labor practice. It has also deferred to awards and settlements, produced by fair procedures and contractual provisions, that encompass the unfair labor practice issue and generate enough evidence to permit adequate consideration of unfair labor practice concerns.

C. *Disturbing Anomalies*

Although the dominant tendency in Board deferral decisions since *Olin* and *United Technologies* has been consistent with the general theory of deferral developed in this Article, a few decisions raise questions as to whether the Board clearly perceives this general theory. In *Sachs Electric Co.*,[362] for example, the Board deferred to an arbitration award, finding that the contractual and statutory claims were factually parallel even though the contractual claim was narrower than the statutory claim.[363] This decision does not appear to be consistent with the general rule that the

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358. *See* Ryder Truck Lines, 273 N.L.R.B. 713 (1984); Yellow Freight Sys., 273 N.L.R.B. 44 (1984). *See also* Martin Redi-Mix, Inc., 274 N.L.R.B. 559, 560 (1985) (emphasis in original)("[T]he arbitrator's factual findings are *not* equivalent to what record evidence actually was submitted to the arbitrator. Thus, it is not necessary for the arbitrator to recite evidence in a written decision." The General Counsel, therefore, must prove that facts were not presented to the arbitrator at some time during the proceeding.).

359. *See* Martin Redi-Mix, Inc., 274 N.L.R.B. 559 (1985).

360. *See* Brewery Workers Joint Local Executive Bd., 277 N.L.R.B. No. 18, 121 L.R.R.M. (BNA) 1050 (Dec. 17, 1985).

361. *See* Martin Redi-Mix, Inc., 274 N.L.R.B. 559 (1985).

362. 278 N.L.R.B. No. 121, 121 L.R.R.M. (BNA) 1269 (Feb. 28, 1986).

363. *Id.* The employee, Verlin, was a vocal union advocate who was laid off February 3, 1984. The union filed a grievance on February 7, alleging that he had been improperly laid off in light of a contract provision calling for a union steward to be the last person laid off and not to be discriminated against. The grievance before the arbitration committee alleged that Verlin's lay off was improper because it resulted from his complaints as a steward about the improper assignment of overtime. Since the evidence did not establish that Verlin was a union steward, the arbitration committee denied the grievance. The committee did not address the discrimination against Verlin based on his complaints as an employee, since only a violation of the provision protecting union stewards and not the "just cause" provision was alleged.

The Board majority found factual parallelism: the conduct that Verlin allegedly engaged in as a union steward was the same conduct that Verlin engaged in as an employee. Thus, the arbitrator, as well as the Board, would have to consider whether Verlin engaged in the conduct, whether he did so in furtherance of the contract, and whether his advocacy, rather

Board should defer only when the contractual claim is of sufficient scope to also dispose of the unfair labor practice issue.[364] As the Board has recognized in pre-settlement and other post-settlement cases, collective bargaining is not encouraged and the parties are disserved if the Board credits the grievance procedures with a settlement that is beyond its scope.[365] Under the general theory, in a case like *Sachs*, the Board's supervisory role is triggered, since collective bargaining is incapable of producing a satisfactory result and the Board cannot permit conduct raising statutory concerns to go unaddressed.

The Board generally has been careful not to defer in pre- and post-settlement cases in which the charge presents a representation question.[366] Because representation issues are central to an employee's right to choose between collective and individual bargaining systems, the Board has properly treated representation cases as nondeferrable.[367] But recently, in *Hospital Employees*,[368] the Board refused to defer to an arbitrator's finding of majority status, when the arbitrator had credited authorization cards that had been tainted by supervisory solicitation. Agreeing with the ALJ, the Board found that the award was repugnant to the Act.[369] While the ultimate holding is consistent with the general theory, the Board's reasoning in *Hospital Employees* may create future problems because it obscures the line between cases in which the Board's role is central and those in which it is merely supervisory. Equally important, the *Hospital Employees* rationale undermines the Board's primary responsibility in representation cases by purporting to apply the lenient "repugnancy" standard in such cases. Since the Board's role in representation cases is primary and not merely supervisory, the Board should have rejected the arbitrator's award as nondeferrable rather than merely "repugnant" to the Act.

Another anomaly is raised by what may have been a mere overstatement of the Board's position in *Anderson Sand & Gravel*.[370] In reviewing the "repugnancy" argument made by the General Counsel, the Board said:

> Because the General Counsel and the judge would have decided the contractual issues in this case differently than the arbitration panel, they argue that deferral is inappropriate. As we have repeatedly stated since our decision in *Olin*, the Board's standard of review does not

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than some legitimate business reason, accounted for his lay off. Yet the majority failed to appreciate the pivotal distinctions that the contract only protected stewards against lay offs and that the arbitration panel was only authorized to consider whether Verlin was entitled to the protection of that provision. *See also* Sachs Elec. Co., 278 N.L.R.B. No. 121, 121 L.R.R.M. (BNA) 1269, 1271 (Feb. 28, 1986) (Dennis, Mem., dissenting in part) (the contractual and statutory issues were *not* factually parallel).

364. The typical example is a "just cause" provision that is broad enough to cover allegations of discharge for statutorily protected activity. *See, e.g.*, Chemical Leaman Tank Lines, 270 N.L.R.B. 1219 (1984).

365. *See, e.g.*, Cotter & Co., 276 N.L.R.B. 714 (1985) (adopting the ALJ's finding that the contractual issue, decided by the arbitrator, was narrower than the statutory issue presented to the Board and, thus, deferral was improper); IBEW Local 1316, 271 N.L.R.B. 338 (1984) (adopting the ALJ's refusal to defer the unfair labor practice issue to grievance-arbitration procedures because the contract contained no provision under which the issue could be considered).

366. *See supra* notes 318, 336 (citing cases in which the Board denied deferral of representation issues).

367. *See, e.g.*, Martin Marietta Chems., 270 N.L.R.B. 821 (1984); Port Chester Nursing Home, 269 N.L.R.B. 150 (1984).

368. 275 N.L.R.B. 272 (1985).

369. The ALJ based this finding of repugnancy on the fact that the arbitrator "ignor[ed] Board precedent in making his award." *Id.* at 274–75. Using the language of *Olin*, the Board said that "the arbitrator['s] award [was] palpably wrong and not susceptible to an interpretation consistent with the Act." *Id.* at 272.

370. 277 N.L.R.B. No. 127, 121 L.R.R.M. (BNA) 1069 (Dec. 23, 1985).

> contemplate that the Board will substitute its judgment for that of the arbitrator in resolving contractual issues. Rather, we will inquire only into whether the arbitrator adequately considered the unfair labor practice issues, which, in this case, we have concluded was satisfactorily done.[371]

This suggests that the Board will review only the scope of arbitration and will not review the substance of the award under the "repugnancy" test, thus melding the *Spielberg* requirement of repugnancy with the separate *Raytheon-Monsanto* requirement of adequate consideration. Such an approach would inappropriately condone awards that threaten the collective bargaining process in cases in which the unfair labor practice issues were considered.[372]

The Board has not yet withheld deference solely on the ground that an award or settlement has not been fair or regular.[373] In *Browne*[374] the Board indicated that it would not scrutinize closely the quality of union representation at a grievant's hearing. As demonstrated in section IV(B),[375] this reluctance undermines both the fair representation premise of collective bargaining and the foundation of deferral as explained by the general theory.[376]

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371. *Id.* at 1070.

372. *See, e.g.*, Garland Coal & Mining Co., 276 N.L.R.B. 963 (1985).

373. The Board considered and rejected such an argument in United Parcel Serv., 270 N.L.R.B. 290 (1984).

374. 278 N.L.R.B. No. 17, 121 L.R.R.M. (BNA) 1121 (Jan. 13, 1986), *rev'd*, Nevins v. NLRB, 796 F.2d 14 (2d Cir. 1986). This case is also referred to as *Bailey Distributors.*

375. *See infra* notes 396–429 and accompanying text.

376. Judicial review of Board deferral decisions is limited to whether the Board abused its discretion under the statute. *See* Lewis v. NLRB, 800 F.2d 818 (8th Cir. 1986); NLRB v. UAW Local 1131, 777 F.2d 1131 (6th Cir. 1985); NLRB v. Iron Workers Local 433, 767 F.2d 1438 (9th Cir. 1985). Since the Act gives the Board the authority both to defer and not to defer, the specific issues on review are whether the Board has departed from its own deferral standards and whether such standards are invalid.*See* NLRB v. Iron Workers Local 433, 767 F.2d 1438, 1442 (9th Cir. 1985).

In the three cases involving deferral to grievance-arbitration procedures decided since *United Technologies*, the Sixth, Eighth, and Ninth Circuits have upheld the Board's decisions as within the proper exercise of its discretion. In each case, the court held that the Board's decision was consistent with precedent and advanced the policies of the Act. *See* NLRB v. UAW Local 1131, 777 F.2d 1131 (6th Cir. 1985) (involving a superseniority provision that was unlawful on its face); Lewis v. NLRB, 800 F.2d 818 (8th Cir. 1986) (involving a suspension and termination); NLRB v. Iron Workers Local 433, 767 F.2d 1438 (9th Cir. 1985) (when an employee claimed the union improperly operated a hiring hall, the Board refused to defer due to the union's conflict of interest with the employee).

Five circuits have considered Board deferral decisions in light of the *Olin* standards. *See* Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986) (questioning whether the Board's deferral to an arbitral award of reinstatement without backpay was based on a collateral estoppel, limited review, pivotal contractual interpretation, or waiver theory, and concluding that the Board's deferral decision was an admixture of all four); Nevins v. NLRB, 796 F.2d 14 (2d Cir. 1986) (vacating the Board's deferral order, holding that the Board had abused its discretion by erroneously finding parallelism between contractual and statutory issues and sufficient evidence on the statutory issue); Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986) ("If [the Multi-State Committee hearing] had produced a dispositive result [with respect to the statutory issue], then deferral to that result would have been proper under any of the many variations of the *Spielberg* standard."); Lewis v. NLRB, 779 F.2d 12 (6th Cir. 1985) (rejecting the argument that the unfair labor practice issue must be reflected in a written award in order to be deemed adequately considered by the arbitrator); NLRB v. IBEW Local 11, 772 F.2d 571 (9th Cir. 1985) (upholding the Board's refusal to defer because of the union's conflict of interest with employees attacking the union's hiring hall procedures); Bakery Workers v. NLRB, 730 F.2d 812 (D.C. Cir. 1984) (upholding the Board's deferral to an arbitrator's award that interpreted the employer's alleged unilateral change as authorized by the contract).

While the *Taylor* decision attacked *Olin* from a number of angles, the specific objection was that the evidence did not indicate that any facts relevant to the unfair labor practice were considered by the arbitration panel:

> This case does not present the court with the question of whether the facts and issues were sufficiently parallel to justify deferral, nor does it involve scrutinizing an arbitral finding for a result that is "clearly repugnant" to the Act. The overriding question in this case is whether the Area Committee ever considered any facts relevant to Taylor's statutory claim.

Taylor v. N.L.R.B., 786 F.2d 1516, 1522 (11th Cir. 1986).

This statement of the issue is disturbing in that the Board overruled the ALJ in part because he had partitioned the

IV. Toward Uniformity and Fairness

A. *Toward a Unitary View of Deferral*

Historically, the Board has bifurcated the deferral discussion into two principal parts: pre-settlement and post-settlement deferral. Post-settlement deferral first emerged with a set of governing standards in *Spielberg*.[377] Pre-settlement deferral followed later with a set of determining factors in *Collyer*.[378] The *Collyer* majority saw the connection between pre- and post-settlement deferral and refused to presume that the untested grievance procedure would not meet *Spielberg* standards.[379] The extension of *Collyer* to individual rights cases in *National Radio*[380] was based on "the

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multi-layered arbitration proceeding in determining whether sufficient evidence on the unfair labor practice issue had been presented. The facts indicated that the Multi-State Committee had clearly considered the unfair labor practice issues as reflected in the minutes of the proceeding. When the Multi-State Committee could not decide the issue, the case was automatically forwarded to the Southern Area Grievance Committee, which then adopted the minutes of the Multi-State Committee, heard from the company but not from the employee or the union, and denied the grievance. The ALJ found that the area committee minutes did not show that the unfair labor practice issue had been considered. The ALJ's approach was identical to that followed by the court in *Taylor*. If the court is willing to bifurcate the arbitration and to ignore one part of it in determining whether deferral was proper, will it ever defer to pre-arbitral settlements when evidence on what the parties considered may be totally lacking? The core issue in *Taylor* was whether the Board could properly require the party seeking a de novo trial to prove that the arbitrator considered facts relevant to the unfair labor practice issue. The court argued that *Olin*'s shifting of the proof burden returns the Board to the presumption created in *Electronic Reproduction*.

Not only is this characterization of the effect of *Olin* incorrect, but the pro-deferral policy aided by *Olin*'s allocation of burdens is fully consistent with the purposes of the Act. In *Electronic Reproduction*, the Board's ruling created a presumption that matters integral to the unfair labor practice issue had been considered simply because the parties *could* have raised the issue. If they had not actually raised the issue deferral would not have been defeated under the rule. Thus, unfair labor practice concerns were permitted to go completely unconsidered. On the other hand, as demonstrated by the numerous cases decided by the Board since *Olin*, the two-pronged test of *Olin* insures that unfair labor practice facts will be considered and the dispute resolved consistently with the Act. The placement of the proof burden merely affirms the primacy of certain values. When the Board's preference was for assuming jurisdiction and against private settlement, the placement of the burden of proof on the party seeking deferral also reflected that policy judgment. The current Board preference for private settlement more faithfully fulfills the Board's normative role under the Act.

The *Taylor* court argued that *Spielberg*'s "fair and regular" standard is not satisfied in the context of Teamster Grievance Committee hearings. As indicia of unfairness the court pointed to truncated hearings and procedural rights, weak or nonexistent evidence, inconvenient hearing sites, nonparticipation of grievants, and inadequate consideration of all relevant facts. *See also* Summers, *The Teamster Grievance Committees: Grievance Disposal Without Adjudication*, 37 Proc. of Nat'l Acad. Arb. 130 (1984). The court failed to perceive that the new standards announced in *Olin* have no bearing on the separate question of whether the proceedings have been fair and regular. Even if the area committee in *Taylor* had explicitly considered and resolved the unfair labor practice issue in a written decision, the proceedings may have been unfair and irregular, thus failing the first *Spielberg/Olin* test. The fairness inquiry is concerned with whether the integrity of the grievance-arbitration procedure warrants Board refusal to assert jurisdiction. Teamster Grievance Committee proceedings may well violate fairness standards, and the court's treatment of that issue reminds the Board of a test that it has infrequently applied. This Article proposes specific content for the *Spielberg/Olin* fairness standard. *See infra* notes 396–429 and accompanying text. The issue of whether the unfair labor practice issue has been adequately considered, however, addresses the scope of the grievance-arbitration procedure to resolve the dispute. Finally, in mistakenly equating the effect of *Olin* with the presumption created by *Electronic Reproduction*, the Eleventh Circuit cited Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981), and McDonald v. City of West Branch, 466 U.S. 284 (1984), as requiring both that the Board hear statutory claims and that *Olin* standards be overturned. On the contrary, these decisions suggest an affirmation of *Olin*. *See supra* notes 207–45 and accompanying text.

377. *See supra* notes 85–94 and accompanying text.

378. *See supra* notes 121–30 and accompanying text.

379. Collyer Insulated Wire, 192 N.L.R.B. 837, 839–43 (1971).

380. 198 N.L.R.B. 527 (1972).

reasonableness of the assumption that the arbitration procedure [would] resolve [the] dispute in a manner consistent with the standards of *Spielberg*."[381]

The pre-settlement and post-settlement deferral questions are only slightly different. Before the collective bargaining process has fully vented the issues, the question is whether the grievance-arbitration procedure is capable of fairly resolving the dispute's unfair labor practice aspects. After the procedure has run its course, the question is whether the process has settled the unfair labor practice issues fairly. Pre-settlement deferral cases question the procedure's potential; post-settlement cases question its performance.

Deferral standards should reflect this slight variation and also permit a uniform approach to deferral questions. Though the Board's *Collyer/United Technologies* factors[382] and *Spielberg/Olin* criteria[383] share much in common, Board decisions show no consciousness of the near identity of the two inquiries. In some cases, the Board interchanges the announced factors and criteria without explicitly making the connection.[384]

Under *Collyer/United Technologies*, in order to determine whether the grievance procedure is capable of resolving the dispute's unfair labor practice issues, the Board considers the stability of the collective bargaining relationship,[385] the respondent's willingness to use the contractual procedure,[386] the likelihood that individual interests would be defended fairly during the process,[387] and the scope of the grievance procedure and its ability to encompass the unfair labor practice dimensions of the dispute.[388] In reviewing the procedure's actual performance in accordance with *Spielberg* and *Olin*, the Board similarly addresses the finality, fairness, and scope of the settlement.[389] Moreover, under the *Olin* two-part test for adequate consideration, both the breadth of contractual provisions and the evidence actually presented to the arbitrator define the scope of the proceedings.[390]

Since post-settlement review is concerned with the actual performance of the settlement process, the Board generally considers the actual result produced by the procedure and looks for "repugnancy." But even this aspect of the deferral analysis is not peculiar to post-settlement review, for when contractual provisions make a

381. *Id.* at 531.

382. *See supra* notes 121–30, 142–45 and accompanying text.

383. *See supra* notes 85–94, 108–11 and accompanying text.

384. *See, e.g.*, General Dynamics Corp., 271 N.L.R.B. 187 (1984) (disallowing the grievant to withdraw from the grievance-arbitration procedure after it had started, but suggesting that some other showing may have been sufficient to overcome deferral, such as a reason to believe that arbitration would not have been fair and regular or some indication that the procedure would produce repugnant results). *See also* United Bhd. of Carpenters and Joiners, 278 N.L.R.B. No. 21, 122 L.R.R.M. (BNA) 1031 (Jan. 21, 1986) (deferring, in part because the contractual and statutory issues were factually parallel).

385. *See, e.g.*, Collyer Insulated Wire, 192 N.L.R.B. 837, 842 (1971) (the length of the relationship); Rappazzo Elec. Co., 281 N.L.R.B. No. 75, 124 L.R.R.M. (BNA) 1299 (Sept. 16, 1986) (whether the employer has shown a hostility to collective bargaining and the exercise of individual rights).

386. *See, e.g.*, Collyer Insulated Wire, 192 N.L.R.B. 837, 842 (1971).

387. *See, e.g., id.* at 843.

388. *See, e.g., id.* at 841–42.

389. *See supra* notes 108–11 and accompanying text.

390. *See supra* notes 108–11 and accompanying text.

repugnant result unavoidable, pre-settlement deferral is inappropriate.[391] The Board has also suggested that any showing that the procedure would produce repugnant results would be sufficient grounds for nondeferral.[392]

The Board could take a major step toward clarifying deferral standards by recognizing that the fairness, scope, and finality standards are identical benchmarks in both the pre- and post-settlement contexts. They are simply used differently, depending on when the deferral question is raised. Before the procedure is used, the standards help the Board predict the procedure's effectiveness. After the procedure has been used, they facilitate the Board's review of its effectiveness. When the contract facially permits the Board to predict the results of arbitration, repugnancy may also be ascertained a priori.[393]

Only the stability issue is uniquely dependent upon when the deferral question is raised. It is relevant only when the prospective use of the grievance procedure is questioned. If the newness of the parties' relationship or if the employer's conduct creates an unacceptable risk of unfair resolution, the procedure is unlikely to work and the Board will not defer. Once settlement has been achieved, instability is only important if it has affected the fairness and regularity of the proceeding.

This uniform view of the deferral question would help the Board avoid the kind of analytical mistake made in *Sachs Electric Co.*[394] There, the Board found the contractual and statutory issues to be factually parallel, even though the contractual issue was narrower than the statutory issue. The arbitrator only considered whether the grievant was entitled to lay off protection as a union steward and not the broader question of whether his lay off constituted "discipline" without just cause.[395] While the typical "just cause" provision is coextensive with subsection 8(a)(1) and (a)(3) claims, arbitrators are not likely to consider unlawful motivation in the context of narrower contractual claims. The Board might have avoided its improper holding in *Sachs Electric* by asking whether it would have deferred prospectively in that case. Since the scope of the contractual provision was too narrow to encompass the unfair labor practice issue, it would have denied deferral under *Collyer/United Technologies*. The same result is appropriate on post-award review and would have been forthcoming under a uniform approach to deferral.

B. *Deferral and Fairness*

Post-settlement review of grievance arbitration is the crucial aspect of the Board's deferral oversight. It justifies pre-settlement deferral,[396] and it fends off the

391. *See* Sheet Metal Workers Local 208, 278 N.L.R.B. No. 87, 121 L.R.R.M. (BNA) 1276 (Feb. 21, 1986); UAW Local 1161, 271 N.L.R.B. 1411 (1984) (discussing the arbitrator's unhelpful role both as a limitation on the scope of the arbitrator's authority and as a threshold question that the Board could not defer).

392. *See* General Dynamics Corp., 271 N.L.R.B. 187 (1984).

393. *See, e.g.*, Rappazzo Elec. Co., 281 N.L.R.B. No. 75, 124 L.R.R.M. (BNA) 1299 (Sept. 16, 1986).

394. 278 N.L.R.B. No. 121, 121 L.R.R.M. (BNA) 1269 (Feb. 28, 1986).

395. *Id.*

396. *See* Lewis v. N.L.R.B., 800 F.2d 818 (8th Cir. 1986); National Radio Co., 198 N.L.R.B. 527, 531 (1972); Collyer Insulated Wire, 192 N.L.R.B. 837, 842 (1971).

"abdication" arguments of critics.[397] If grievance arbitration can demonstrate competence to dispose of statutory issues when the parties submit to the process before commencing a Board action, it is difficult to argue against the pre-settlement postponement of Board action. If the Board's review of the settlement is careful, the "abdication" argument is without merit, since the Board continues adequately to supervise the contractual process.[398]

Understanding its supervisory role, the Board readily exercises jurisdiction when the grievance procedure is incapable of resolving the unfair labor practice aspects of the dispute. For the same reason, the Board must closely scrutinize both the process and its result. The "repugnancy" standard assures proper review of the result and the Board's new *Olin* standards guarantee arbitration's adequate consideration of the unfair labor practice issue.

Whether the conduct of the proceeding has been conducive to a fair result depends on the "fairness and regularity" of the proceeding. Regularity is easily met by affording the grievant basic due process and confrontational rights as well as an impartial decision maker.[399] The assurance of fairness will depend upon the degree to which the Board is willing to examine the proceeding under the *Olin* fairness standard.

In *Bailey Distributors*,[400] an ALJ refused to defer to an arbitrator's award, noting that the proceeding before the arbitrator had not been fair and regular. The grievant had retained private counsel to help him establish that he had been constructively discharged and unjustly deprived of contractual benefits, and therefore, was entitled to reinstatement and back pay. Although an arbitrator held that the employee was not covered by the contract, the ALJ found that the union's interests conflicted with the employee's. There was evidence that the union had not enforced the contract as to the grievant, that the grievant had sued the union because it made no effort to cure breaches relating to the grievant, and that there was animosity between union counsel and the attorney representing the grievant. The ALJ also concluded that the union had not effectively represented the grievant at the arbitration proceeding. In a decision that seems justified by the facts, the Board reversed the ALJ's findings on the "fairness" issue, citing countervailing evidence that the potential conflicts between union and grievant counsel had not affected the fairness

397. *See* Olin Corp., 268 N.L.R.B. 573, 577 (1984) (Zimmerman, Mem., dissenting in part); United Technologies Corp., 268 N.L.R.B. 557, 561 (1984) (Zimmerman, Mem., dissenting); National Radio Co., 198 N.L.R.B. 527, 531 (1972) (Fannings & Jenkins, Mems., dissenting); Collyer Insulated Wire, 192 N.L.R.B. 837, 850 (1971) (Jenkins, Mem., dissenting); General Am. Transp., 228 N.L.R.B. 808, 810 (1977) (Murphy, Chr., concurring); Moses, *supra* note 150.

398. While the General Counsel and her designees attempt to implement Board policy uniformly throughout the agency, commentators have noted that much of this review occurs at the regional level. *See* Morris, *supra* note 150, at 304–05; Shank, *supra* note 150, at 240–42.

399. Pre-*Olin* cases indicate that the Board will look to a variety of factors in assessing the regularity of the proceeding. *See* Versi Craft Corp., 221 N.L.R.B. 1171 (1975) (opportunity for direct and cross examination); Associated Press, 199 N.L.R.B. 1110 (1972) (record of the proceeding, representation); Roadway Express Inc., 145 N.L.R.B. 513 (1963) (arbitral impartiality); Gateway Transp. Co., 137 N.L.R.B. 1763 (1962) (adequate notice of hearing and opportunity to prepare). *But see* United Parcel Serv., 270 N.L.R.B. 290 (1984); United Parcel Serv., 232 N.L.R.B. 1114 (1977) (impartiality is not necessarily diminished because the arbitration panel is without a neutral party).

400. 278 N.L.R.B. No. 17, 121 L.R.R.M. (BNA) 1121 (Jan. 21, 1986), *rev'd*, Nevins v. N.L.R.B., 796 F.2d 14 (2d Cir. 1986).

of the hearing.[401] Regarding the quality of the union's representation of the grievant at arbitration, however, the Board sounded the following disturbing note:

> Regarding the judge's conclusion that the Union did not effectively present Nevins' case to the arbitrator, . . . we will not grant a trial *de novo*. We will not examine the arbitration proceedings from the perspective of whether the case could have been presented before the arbitrator more effectively, more persuasively, or in a more logical manner. We will not refuse to defer to an arbitration award because an argument can be made, with the benefit of hindsight, that a more effective presentation might have changed the arbitrator's decision.[402]

While this statement does not disavow a willingness to apply basic standards of fairness, its tone reveals an unpredictable degree of resistance to the review of arbitration proceedings.[403] In view of the fair representation premise of collective bargaining,[404] the posture taken by the Board in *Bailey Distributors* would undermine the foundation of deferral as explained by the general theory. If the Board routinely deferred to awards of questionable fairness, it would also give credence to the critics' cries of "abdication" and reverse the progressive direction of the Board's deferral policy.[405]

"Fairness" is an amorphous concept that can be difficult to apply.[406] Some of the most concrete "fairness" guidelines can be gleaned from cases addressing the union's duty of fair representation (DFR). Although recognized as more demanding,[407] standards developed under this duty are uniquely transferable to the fairness category of *Spielberg* and *Olin*.[408] The union's authority to bargain on behalf of individual employees, whose individual rights and interests may be compromised in the process, is conditioned upon the union's DFR.[409] This duty protects the individual in the collective system.[410] Collective bargaining will produce the individual

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401. *Id.*

402. *Id.* at 1124.

403. In earlier cases the Board did indicate a willingness to inquire as to the quality of representation under the "fairness" rubric. *See, e.g.*, Mason & Dixon Lines Inc., 237 N.L.R.B. 6 (1978).

404. *See supra* notes 172–81 and accompanying text.

405. A recurring criticism of deferral is that unions may half-heartedly process employee grievances without violating their duty of fair representation, thereby depriving employees of statutory protection. *See, e.g.*, Moses, *supra* note 150, at 229.

406. *See* Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980); Freed, Polsby & Spitzer, *Union, Fairness, and the Conundrums of Collective Bargaining*, 56 S. CAL. L. REV. 465 (1983); Hyde, *Can Judges Identify Fair Bargaining Procedures?: A Comment on Freed, Polsby & Spitzer*, 57 S. CAL. L. REV. 415 (1984); Freed, Polsby & Spitzer, *A Reply to Hyde, Can Judges Identify Fair Bargaining Procedures?*, 57 S. CAL. L. REV. 425 (1984); Harper & Lupu, *supra* note 247.

407. *See* Schatzki, *supra* note 106, at 910.

408. *Cf.* Harper & Lupu, *supra* note 247, at 1281–82 n.290 in which it is stated:

> The threat that this deferral policy poses to employees' control over the union that represents their interests in arbitration should not, however, be met by tightening DFR review. It should be met directly by restricting the Board's authority to defer to contractual arbitration when it is charged that an employer or a union has interfered with an employee's right to choose or influence her collective bargaining representative.

This Article does not propose tightening DFR review, rather, it proposes tightening fairness review under *Spielberg* and *Olin*, with the aid of DFR standards.

409. *See* Metropolitan Edison Co., 460 U.S. 693 (1983); Hines v. Anchor Motor Freight, 424 U.S. 554 (1975); NLRB v. Magnavox Co., 415 U.S. 322 (1974); Vaca v. Sipes, 386 U.S. 171 (1967); Steele v. Louisville & N. Ry., 323 U.S. 192 (1944).

410. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

employee benefits contemplated by the statute only if unions do their jobs fairly and in the best interests of all employees. Particularly in cases involving individual rights, it is appropriate for the Board to require that DFR standards be satisfied before it approves the settlement.

DFR standards do not require the degree of scrutiny rejected by the Board in *Bailey Distributors*.[411] Federal circuit courts disagree over how much scrutiny should be given to union representation during arbitration proceedings.[412] The Supreme Court's only guidance has come in *Vaca v. Sipes*[413] and *Hines v. Anchor Motor Freight*.[414] In *Vaca*, the Court held that a union could properly settle a grievance short of arbitration and defined the DFR as barring arbitrary, discriminatory, or bad faith conduct, as well as the perfunctory processing of meritorious grievances.[415] *Hines* held that the duty could be breached when the union's quality of representation was unacceptable, even though an arbitration award had issued.[416] The Court deemed the union's failure to adequately investigate the case and to present exculpatory evidence at arbitration as sufficient to raise a question of bad faith performance under the *Vaca* standards.

The Seventh Circuit has held that the DFR may only be breached by intentional union misconduct.[417] The First, Fifth, Eighth, and Eleventh Circuits have held that a breach must occur with "nothing less than demonstrated reckless disregard."[418] The Sixth, Ninth, and Tenth Circuits have held unions liable for the negligent failure to perform ministerial acts.[419] Notably, the NLRB requires something more than mere negligence, that is, something rising to purposeful or willful misconduct.[420]

Resolution of the debate over the appropriate standard is not necessary for the Board to gain useful insights into post-award review of arbitral fairness. Courts adopting standards more lenient than negligence worry about supervising the collective bargaining process too closely.[421] In this context, the sole function of courts in furthering national labor policy is to enforce collective bargaining

411. *See supra* note 400–02 and accompanying text. Even though this discussion focuses on the quality of union representation during arbitration, it is also relevant to grievance settlements achieved before those cases reach arbitration.

412. *See infra* notes 417–20 and accompanying text. *See generally* Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. ILL. L. REV. 35.

413. 386 U.S. 171 (1967).

414. 424 U.S. 554 (1975).

415. *See* Vaca v. Sipes, 386 U.S. 171, 190–91 (1967).

416. *See* Hines v. Anchor Motor Freight, 424 U.S. 554, 567–68 (1975).

417. *See* Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242 (7th Cir. 1986) (the following reasons were given for rejecting a causation standard: (1) The courts would become too embroiled in deciding the merits of disputes, which is against the national policy of private settlement; (2) a causation or negligence standard "would interfere with employees' right to choose the level of care for which they are willing to pay"; (3) employee control over how contentious they want to be and how much of their resources should be spent on grievance processing would be interfered with; and (4) the employer would be shielded from the "risk of error" in relying upon the union's performance in arbitration).

418. *See* Earley v. Eastern Transfer, 699 F.2d 552 (1st Cir. 1983); Grovnor v. Georgia Pac. Corp., 625 F.2d 1289 (5th Cir. 1980); Curtis v. United Transp. Union, 700 F.2d 457 (8th Cir. 1983); Harris v. Schwerman Trucking Co., 668 F.2d 1204 (11th Cir. 1982).

419. *See* Milstead v. Teamsters Local 957, 580 F.2d 232 (6th Cir. 1978); Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983); Foust v. IBEW, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979).

420. *See* Local 1310 Painters & Allied Trades, 270 N.L.R.B. 560 (1984); Union of Security Personnel, 267 N.L.R.B. 974 (1983); Crown Zellerbach Corp., 266 N.L.R.B. 1232 (1983).

421. *See, e.g.*, Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242, 244 (7th Cir. 1986).

agreements. Yet the Board serves the distinct function of preventing unfair labor practices, and therefore must supervise more closely the performance of the collective bargaining process in determining the propriety of post-settlement deferral. Thus, the Board's reviewing of the fairness of the arbitral process calls for the closer scrutiny promoted by the "reasonable care" standard.

Cases addressing the union's DFR in preparing and conducting arbitration are most relevant to post-award review of arbitral fairness. In *Milstead v. Teamsters Local 957*,[422] the union breached its DFR because it failed to notice and argue a missing contractual provision that would have sustained the grievance. Fairness similarly requires that a union raise the contractual claim deemed factually parallel under *Olin*.[423] Using this guideline, the Board's holding in *Sachs Electric* would have been different. There, the union claimed in arbitration that the grievant's lay off was improper, because he enjoyed superseniority as a union steward. The union did not argue that grievant's discharge was without "just cause." The arbitrator held that the grievant was not a union steward and consequently upheld the lay off. The Board deferred even though the broader claim that the grievant's lay off was improperly motivated was neither directly nor indirectly presented to nor decided by the arbitrator. As discussed above,[424] a unitary approach to this question would have revealed that the statutory and contractual issues were not factually parallel. Moreover, the union's failure to assert a protective contractual provision violates the DFR under *Milstead*. The contractual claim that was not asserted supplies the basis for an "adequate consideration" finding under *Olin*. Thus, the union's failure to assert such a claim should also be deemed a breach of the "fairness" standard under *Spielberg* and *Olin*.

Circuit courts have also held that the union breaches its DFR in presenting grievances, when it fails to present evidence essential to sustaining the grievance.[425] In some cases, the duty to present key evidence may require something more than evidence generally relevant to the unfair labor practice issue. For example, assume the grievant alleges that the company discharged him because of his protected grievance filing activity, but the company claims the termination was based on poor work performance. The union then presents a witness who testifies that the supervisor "seemed" to have a more hateful attitude toward the grievant but fails to produce a witness who would testify that the supervisor told him that grievant's grievance filing activities would return to haunt him. While the evidence presented may meet the *Olin* standard for "adequate consideration" of the unfair labor practice issue,[426] the

422. 580 F.2d 232 (6th Cir. 1978).

423. *See* Olin Corp., 268 N.L.R.B. 573 (1984). When contractual provisions specifically incorporate statutory protections, the *Olin* standards may require the unfair labor practice claim to be submitted to the arbitrator and specific evidence on that claim to be presented. *See* Superior Fast Freight, 225 N.L.R.B. 329 (1985).

424. *See supra* notes 377–95 and accompanying text.

425. *See* Miller v. Gateway Transp. Co., 616 F.2d 272 (7th Cir. 1980) (holding that the union's perfunctory reading of a pro se grievance without showing that the employer did not issue a prerequisite warning and the failure to investigate grievant's charges violated DFR); Baldini v. Local 1095 UAW, 581 F.2d 145 (7th Cir. 1978) (the union failed to present key witnesses in grievant's behalf).

426. *See* Martin Redi-Mix, Inc., 274 N.L.R.B. 559 (1985); Hilton Hotels Corp., 272 N.L.R.B. 488 (1984);

union's failure to produce essential evidence of an unfair labor practice would nonetheless breach its DFR under a "reasonable care" standard.[427] Thus, the Board's review of the proceeding for "fairness" should result in a decision not to defer.[428]

Finally, the "reasonable care" standard of representation would permit the Board to adjust its degree of scrutiny depending on the nature of the settlement procedures used to resolve the dispute. For example, settlements not involving a neutral party may generally warrant closer scrutiny than conventional arbitration proceedings.[429]

V. CONCLUSION

This Article has articulated a theory of deferral that explains the circumstances and reasons governing Board deferral to contractual grievance procedures. Recently, the District of Columbia Circuit Court of Appeals remanded a Board decision deferring to an arbitrator's award.[430] In so doing, the court urged the Board to articulate a "general theory of deference"[431] that would explain whether the Board could properly defer to an arbitrator's award "that is doctrinally different from Board precedent."[432] In that case, the Board had deferred to an arbitrator's award that found the employer had discharged a union steward in violation of both the contract and the NLRA, but ordered a remedy of reinstatement without backpay. The arbitrator withheld backpay because the employee had refused to leave the plant after the incident leading to her discharge. The court initially objected to the Board's assertion that the arbitrator's remedy was consistent with the Board's remedial approach. While acknowledging that the Board previously had denied backpay to unlawfully discharged employees who engaged in later misconduct, the court distinguished those cases as denying both reinstatement *and* backpay. Had the arbitrator followed the rule suggested by the court's distinction, the grievant would have received even less protection than the arbitrator's award afforded.

Consolidated Freightways Corp. 257 N.L.R.B. 1281 (1981) (a pre-*Olin* case in which deferral was denied because of the union's failure to offer evidence).

427. *See* Miller v. Gateway Transp. Co., 616 F.2d 272, 276–77 (7th Cir. 1980); Baldini v. Local 1095 UAW, 581 F.2d 145 (10th Cir. 1978).

428. The discussion in *Bailey Distributors* indicates that the Board recognizes in both the pre- and post-arbitral setting the unfairness that can occur when the grievant's representative has interests adverse to the grievant's. Thus, Board scrutiny of joint committee decisions should be particularly careful in light of the opportunity for collusion between management and union representatives when the union considers the grievance "unmeritorious or undeserving." *See* Rabin, *Fair Representation in Arbitration*, in THE CHANGING LAW OF FAIR REPRESENTATION 178–80 (J. McKelvey ed. 1985). *See also* Summers, *Measuring the Union's Duty to the Individual*, in THE CHANGING LAW OF FAIR REPRESENTATION 168–69 (J. McKelvey ed. 1985) (summarizing the concrete measures of the DFR in different categories of cases).

Under the approach proposed in this Article, there is no danger of proliferating DFR Board actions. First, the standard proposed here—"reasonable care"—is higher than that currently adopted by the Board. Thus, the failure to meet the standard does not necessarily breach the duty as currently stated. Second, the "reasonable care" standard only scrutinizes the representative's handling of the unfair labor practice issue, not the entire contractual claim. If the standard is not met on the former, the Board simply refuses to defer and subsequently hears the dispute.

429. *See* Summers, *supra* note 60, at 151–52.

430. *See* Darr v. NLRB, 801 F.2d. 1404 (D.C. Cir. 1986).

431. *Id.* at 1409.

432. *Id.* at 1408.

Apparently the court was troubled by the Board's failure to explain its reasons for deferral generally, and particularly in that case. In expressing the concern that the Board clearly explain a general theory of deferral, the court identified four theories that are interwoven throughout key deferral decisions: collateral estoppel, limited scope of review, deference to contract interpretation, and waiver. Regarding the Board's "admixture of theories" as unsatisfactory, the court returned the case to the Board with instructions that deferral decisions be given a theoretical framework.

None of the labels suggested by the court adequately explains the principle of deferral. As section II of the Article demonstrates, each of the four theories suggested by the court provides some insight into the foundation of deferral, but none is sufficient to fully explain the principle.

It is not surprising that Board deferral defies theoretical labeling. The Act is, at best, ambivalent on this issue. The NLRA creates the right to engage in collective bargaining and obligates the Board to insure that the right is protected. It expresses a preference for private adjustment procedures and emphasizes the Board's authority to prevent unfair labor practices, despite such private adjustment procedures. Perhaps the best label for the relationship between the Board and contractual settlement procedures is "overlapping jurisdiction." This notion suggests that both the Board and the grievance system have exclusive jurisdiction in some cases and shared jurisdiction in others. Cases involving the Board's central focus, such as representation cases, fall within the Board's exclusive jurisdiction. On the other hand, contract interpretation cases not involving unfair labor practices fall within the grievance procedure's exclusive jurisdiction. The Board and grievance procedure share jurisdiction, for example, in cases involving unfair labor practices that can be fairly resolved without encroaching upon the central concerns of the Board.

Given the recent spate of scholarly criticism relating to the Board's deferral policy, the District of Columbia Circuit will certainly not be alone in insisting upon a well-supported statement of deferral policy from the Board. This Article has attempted to set forth the basis for such a statement.

APPENDIX I

Pre-Settlement Deferral Cases Decided Since *United Technologies*

CASE	ACTION TAKEN
General Dynamics Corp., 268 N.L.R.B. 1432 (1984) (§ 8(a)(5) disclosure of information).	Not deferred. Disclosure of information is a precondition of the resolution of the grievance.
Wellman Thermal Sys., 269 N.L.R.B. 159 (1984) (exception to ALJ's supplemental order resolving disputes under Board settlement).	Not deferred. Board settlement does not refer such disputes to the grievance procedure.
Manville Forest Prod. Corp., 269 N.L.R.B. 390 (1984) (§ 8(a)(3) discriminatory suspension).	Not deferred. Deferral inappropriate since neither party requested it.
United States Postal Serv., 270 N.L.R.B. 114 (1984) (§ 8(a)(1), (3) discriminatory harassment and suspension).	Deferred.
Martin Marietta Chems., 270 N.L.R.B. 821 (1984) (unit clarification petition).	Not deferred. Questions of representation appropriately determined only by the Board.
General Dynamics Corp., 270 N.L.R.B. 829 (1984) (§ 8(a)(5) refusal to supply allegedly confidential information).	Not deferred. Not appropriate to defer disclosure cases.
United States Postal Serv., 270 N.L.R.B. 976 (1984) (§ 8(a)(1) threat).	Deferred.
United States Postal Serv., 270 N.L.R.B. 1022 (1984) (§ 8(a)(5) refusal to abide by prior grievance solution).	Deferred.
S.Q.I. Roofing, Inc., 271 N.L.R.B. 1 (1984) (§ 8(a)(5) failure to notify union of scheduling weekend work under the contract).	Not deferred. Orderly procedure and fairness require that the § 8(a)(5) issue not be separated from the § 8(a)(1), (3) issues in which deferral has not been requested.

General Dynamics Corp., 271 N.L.R.B. 187 (1984) (§ 8(a)(3) discriminatory suspension of union steward).	Deferred.
IBEW Local 1316, 271 N.L.R.B. 338 (1984) (§ 8(b)(1)(B) trying, fining, and suspending a supervisor).	Not deferred. No contractual provision relating to the propriety of union fines of supervisors.
International Harvester Co., 271 N.L.R.B. 647 (1984) (§ 8(a)(4) retaliation and § 8(a)(3) more onerous working conditions).	Not deferred. Section 8(a)(4) enforcement is nondelegable and connected § 8(a)(3) is not deferred for administrative economy.
Roadway Express, Inc., 271 N.L.R.B. 1238 (1984) (§ 8(a)(1) threatened suspension of strikers).	Deferred.
United States Postal Serv., 271 N.L.R.B. 1297 (1984) (§ 8(a)(1) impression of surveillance and § 8(a)(5) unilateral changes).	Deferred.
Local 1161, UAW, 271 N.L.R.B. 1411 (1984) (§ 8(b)(2) unlawful superseniority clause and § 8(b)(1)(A) attempt to enforce the unlawful superseniority clause).	Not deferred. Clear contractual language reveals unlawful contract.
United Beef Co., 272 N.L.R.B. 66 (1984) (§ 8(a)(1), (3) harassment and discharge of union steward for grievance filing).	Deferred.
Hendrickson Bros., 272 N.L.R.B. 438 (1984) (§ 8(a)(1) discharge for protesting working conditions).	Not deferred. Both parties to contract plainly opposed to employee's interests.
Commercial Cartage Co., 273 N.L.R.B. 637 (1984) (§ 8(a)(5) unilateral change).	Deferred.
United Food Management Serv., Inc., 273 N.L.R.B. 1611 (1985) (§ 8(a)(1), (5) failure to inform new employees of the obligation to join the union in violation of the contract).	Deferred.

United States Postal Serv., 273 N.L.R.B. 1746 (1985) (§ 8(a)(5) unilateral change of grievance processing policy without authorization or bargaining and § 8(a)(1) threat to suspend).	Deferred § 8(a)(5) charge. Section 8(a)(1) charge was not deferred since no request for deferral was made.
Roadway Express Inc., 274 N.L.R.B. 357 (1985) (§ 8(a)(4) retaliatory discharge).	Not deferred. The Board must protect its processes.
United Technologies Corp., 274 N.L.R.B. 504 (§ 8(a)(1) rule barring wearing of protest buttons, § 8(a)(3) unlawful disciplining of employee for union steward activity, and § 8(a)(5) refusal to supply information for grievance processing).	Deferred § 8(a)(1), (3) charges. Section 8(a)(5) charge was not deferred since a two-tiered arbitration process in which disclosure and underlying grievance are submitted to an arbitrator is inappropriate.
Local 702, IBEW, 274 N.L.R.B. 1292 (1985) (§ 8(b)(1)(B) union discipline of supervisor).	Not deferred. Remand for hearing on whether this issue is within the scope of the contract.
Northern Cal. Dist. Council of Laborers, 275 N.L.R.B. 278 (1985) (§ 8(b)(1)(A) retaliation for filing unfair labor practice charges).	Not deferred. Protecting Board processes.
Griffith-Hope Co., 275 N.L.R.B. 475 (1985) (§ 8(a)(5) subcontracting without bargaining).	Not deferred. Not requested.
E.I. du Pont de Nemours & Co., 275 N.L.R.B. 693 (1985) (§ 8(a)(5) unilateral change and direct dealing).	Deferred.
O. Voorhees Painting Co., 275 N.L.R.B. 779 (1985) (§ 8(a)(1), (5) failure to furnish information and refusal to comply with the contract).	Not deferred. Inappropriate to defer information disclosure cases.
Chevron U.S.A., Inc., 275 N.L.R.B. 949 (1985) (§ 8(a)(3) suspension of sympathy strikers).	Deferred.

Spann Bldg. Maintenance Co., 275 N.L.R.B. 971 (1985) (§ 8(a)(1) discharge for protesting involuntary transfer).	Deferred.
Clinchfield Coal Co., 275 N.L.R.B. 1384 (1985) (§ 8(a)(5) refusal to furnish information).	Not deferred. Inappropriate to defer information disclosure cases.
Victor Block, Inc., 276 N.L.R.B. 676 (1985) (§ 8(a)(5) failure to apply terms of contract).	Not deferred. Employer disavowed contract, refused to arbitrate dispute, and refused to waive time limitations on filing of grievance.
International Ass'n of Bridge, Structural, & Ornamental Iron Workers Local 587, 276 N.L.R.B. 748 (1985) (§ 8(b)(3) refusal to bargain).	Deferred.
KCW Furniture Co., 276 N.L.R.B. 957 (1985) (§ 8(a)(5) unilateral changes leading to suspensions of two employees).	Deferred.
Southwestern Bell Tel. Co., 276 N.L.R.B. 1053 (1985) (§ 8(a)(1) removal of scab notice from company bulletin board).	Not deferred. Employer did not agree to waive time limitations or to arbitrate.
Bradley Univ., 276 N.L.R.B. 1139 (1985) (§ 8(a)(5) unilateral change of lunch break practice).	Deferred.
United States Postal Serv., 276 N.L.R.B. 1282 (1985) (§ 8(a)(5) refusal to furnish information necessary for grievance processing).	Not deferred. Disclosure cases inappropriate for deferral.
E.W. Buschman Co., 277 N.L.R.B. No. 21, 120 L.R.R.M. (BNA) 1253 (Oct. 31, 1985) (§ 8(a)(5) refusal to furnish information necessary for grievance processing).	Not deferred. Disclosure cases inappropriate for deferral.

Hutchinson Fruit Co., 277 N.L.R.B. No. 54 120 L.R.R.M. (BNA) 1258 (Nov. 15, 1985) (§ 8(a)(5) insistence on tape recording of the grievance meeting led to impasse).	Not deferred. Rejection of principles of collective bargaining.
Amoco Oil Co., 278 N.L.R.B. No. 3, 121 L.R.R.M. (BNA) 1308 (Jan. 16, 1986) (§ 8(a)(1) refusal of union representation at disciplinary hearing).	Not deferred. Contractual grievance-arbitration provisions too limited.
United Bhd. of Carpenters & Joiners, 278 N.L.R.B. No. 21, 122 L.R.R.M. (BNA) 1031 (Jan. 21 1986) (§ 8(b)(3) refusal to bargain).	Deferred.
Shopmen's Local 539, 278 N.L.R.B. No. 24, 122 L.R.R.M. (BNA) 1043 (Jan. 22, 1986) (§ 8(b)(1)(A) refusal to honor resignation and post-resignation attempts to collect union dues).	Not deferred. Grievance procedure only covers disputes between employer and union, or between employer and employee. Interests of union and employee are adverse.
Coalite, Inc., 278 N.L.R.B. No. 40, 122 L.R.R.M. (BNA) 1030 (Jan. 30, 1986) (§ 8(a)(5) unilateral changes in insurance benefits).	Not deferred. Untimely raised, since raised for first time in exceptions.
United Food & Commercial Workers Local 88, 278 N.L.R.B. No. 68, 122 L.R.R.M. (BNA) 1055 (Jan. 31, 1986) (§ 8(a)(5) unilateral change).	Deferred.
Sheet Metal Workers Local 208, 278 N.L.R.B. No. 87, 121 L.R.R.M. (BNA) 1276 (Feb. 21, 1986) (§ 8(b)(1)(A) fining employees for crossing the picket line after resigning).	Not deferred. The Board must decide the threshhold issue of whether a contractual provision is unlawful.

Grand Rapids Die Casting Corp., 279 N.L.R.B. No. 93, 122 L.R.R.M. (BNA) 1212 (Apr. 29, 1986) (§ 8(a)(4) retaliation).	Not deferred. Deferral inappropriate in § 8(a)(4) cases.
Communications Workers, 280 N.L.R.B. No. 9, 124 L.R.R.M. (BNA) 1158 (May 30, 1986) (§ 8(b)(3) unilateral refusal to comply to contractual cost sharing provision).	Not deferred. Employer could not invoke arbitration under the grievance procedure.
Burroughs Interstate Servs. Credit Union, 280 N.L.R.B. No. 34, 122 L.R.R.M. (BNA) 1209 (June 10, 1986) (§ 8(a)(5) unilateral change in wage increases).	Not deferred. Compliance issue.
United States Postal Serv., 280 N.L.R.B. No. 80, 122 L.R.R.M. (BNA) 1337 (June 24, 1986) (§ 8(a)(5) refusal to supply information).	Not deferred. Disclosure important to role as collective bargaining representative.
United States Postal Serv., 281 N.L.R.B. No. 32, 123 L.R.R.M. (BNA) 1351 (Aug. 29, 1986) (§ 8(a)(5) direct dealing and unilateral grievance adjustment).	Not deferred. Employer's request for deferral did not specifically encompass the unfair labor practice issue.
Carolina Freight Carriers Corp., 281 N.L.R.B. No. 69, 123 L.R.R.M. (BNA) 1299 (Sept. 30, 1986) (§ 8(a)(3) discriminatory work assignments and § 8(a)(1) warning for protected activity).	Deferred.
Rappazzo Elec. Co., 281 N.L.R.B. No. 75, 124 L.R.R.M. (BNA) 1299 (Sept. 16, 1986) (§ 8(a)(5) unilateral modification of employment conditions).	Not deferred. Unilateral changes amounted to a rejection of the collective bargaining agreement

Santulli Mail Serv. Inc., 281 N.L.R.B. No 153, 124 L.R.R.M. (BNA) 1158 (Oct. 17, 1986) (§ 8(a)(5) discontinuance of contributions to union's health and welfare fund).	Not deferred. Employer rejected principles of collective bargaining.
Local 814, 281 N.L.R.B. No. 153, 124 L.R.R.M. (BNA) 1366 (Sept. 30, 1986) (§ 8(b)(1)(A) failure to process employee grievance).	Not deferred. Adversity of interest between union and employee interests.

APPENDIX II

Post-Settlement Cases Decided Since *Olin*

CASE	ACTION TAKEN
Port Chester Nursing Home, 269 N.L.R.B. 150 (1984) (§§ 8(b)(1)(A), (b)(2), (a)(2), (a)(3) unlawful merger).	Not deferred. Merger raised question concerning representation.
Manville Forest Prods. Corp., 269 N.L.R.B. 390 (1984) (§ 8(a)(3) discriminatory suspension).	Not deferred. Not requested.
John Morrell & Co., 270 N.L.R.B. 1 (1984) (§ 8(a)(3) discharge for not instructing co-workers to cease wildcat strike).	Not deferred. Repugnant, since not susceptible to any interpretation consistent with the Court's interpretation of the Act.
Pinkerton's, Inc., 270 N.L.R.B. 27 (1984) (§ 8(a)(3) discriminatory refusal to recall).	Deferred.
Louis G. Freeman Co., 270 N.L.R.B. 80 (1984) (§ 8(a)(3) discriminatory suspension).	Deferred.
United Parcel Serv., Inc., 270 N.L.R.B. 290 (1984) (§ 8(a)(1) discriminatory discharge).	Deferred.
Altoona Hospital, 270 N.L.R.B. 1179 (1984) (§ 8(a)(3) interference with statutory right to pursue grievance).	Deferred.
Chemical Leaman Tank Lines, 270 N.L.R.B. 1219 (1984) (§ 8(a)(3) discriminatory discharge).	Deferred.
Combustion Eng'g, Inc., 272 N.L.R.B. 215 (1984) (§ 8(a)(5) unilateral change of attendance policy).	Deferred.
Hilton Hotels Corp., 272 N.L.R.B. 488 (1984) (§ 8(a)(3) failure to reinstate sympathy strikers).	Deferred.

Badger Meter, Inc., 272 N.L.R.B. 824 (1984) (§ 8(a)(5) unilateral changes).	Deferred.
Yellow Freight Sys., 273 N.L.R.B. 44 (1984) (§ 8(a)(3) discriminatory discharge).	Deferred.
Ryder Truck Lines, 273 N.L.R.B. 713 (1984) (§ 8(a)(1) discriminatory discharge for failure to drive unsafe truck).	Deferred.
District 1199E, Hosp. & Health Care Employees, 273 N.L.R.B. 1458 (1985) (§ 8(b)(3) refusal to bargain).	Deferred.
Cone Mills Corp., 273 N.L.R.B. 1515 (1985) (§ 8(a)(3) discriminatory discharge and partial remedy).	Deferred.
Shimazaki Corp., 274 N.L.R.B. 15 (1985) (§ 8(a)(1), (3) discriminatory discharge for protected activity).	Deferred.
United Parcel Serv., Inc., 274 N.L.R.B. 396 (1985) (§ 8(a)(3) discriminatory discharge).	Deferred.
Paper Mfg. Co., 274 N.L.R.B. 491 (1985) (§ 8(a)(5) refusal to bargain)	Not deferred. Raised question concerning representation
Martin Redi-Mix, Inc., 274 N.L.R.B. 559 (1985) (§ 8(a)(1) discharge for protected activity).	Deferred.
United Parcel Serv., Inc., 274 N.L.R.B. 667 (1985) (§ 8(a)(1) discharge for asserting right grounded in contract).	Deferred.
Ohio Edison Co., 274 N.L.R.B. 874 (1985) (§ 8(a)(3) suspension for honoring picket line).	Deferred.

West Penn Power Co., 274 N.L.R.B. 1160 (1985) (§ 8(a)(3) union officers received harsher punishment for failure to stop unlawful work stoppage).	Deferred.
1115, Nursing Home & Hosp. Employees Union, 275 N.L.R.B. 272 (1985) (§ 8(b)(1)(A) suit to enforce arbitrator's finding of card majority and duty to recognize based on tainted cards).	Not deferred. Repugnant, since award seeks to achieve a prohibited objective and lacks a reasonable basis in fact and in law.
Superior Fast Freight, 275 N.L.R.B. 329 (1985) (§ 8(a)(3) discriminatory discharge).	Not deferred. Fails *Olin* tests of adequate consideration.
United States Postal Serv., 275 N.L.R.B. 430 (1985) (§ 8(a)(1) denial of rights).	Deferred.
Griffith-Hope Co., 275 N.L.R.B. 487 (1985) (§ 8(a)(5) unilateral change of insurance coverage).	Deferred.
Chevron U.S.A., Inc., 275 N.L.R.B. 949 (1985) (§ 8(a)(3) discriminatory discharge of sympathy strikers).	Deferred.
Cotter & Co., 276 N.L.R.B. 714 (1985) (§ 8(a)(3), (5) transfer of facility without transferring employees and change to lease-driver arrangement).	Not deferred. Contract is silent as to employees' rights under the Act.
A.N. Elec. Corp., 276 N.L.R.B. 887 (1985) (§ 8(a)(1) discharge for protected concerted activity).	Not deferred. Settlement was not in context of established grievance-arbitration procedure, discrepancies existed between written and actual settlements, and Davis-Bacon liabilities and not liabilities of unfair labor practices were settled.

Garland Coal & Mining Co., 276 N.L.R.B. 963 (1985) (§ 8(a)(3) discriminatory discharge).	Not deferred. Repugnant, since discharge of union president was for activity in support of a union's interpretation of the contract.
Sawin & Co., 277 N.L.R.B. No. 44, 120 L.R.R.M. (BNA) 1287 (Nov. 12, 1985) (§ 8(a)(3) refusal to reinstate unfair labor practice strikers).	Deferred.
Liquid Carbonic Corp., 277 N.L.R.B. No. 91, 121 L.R.R.M. (BNA) 1116 (Nov. 26, 1985) (§ 8(a)(5) subcontracting in violation of contract).	Deferred.
Brewery Workers Joint Local Exec. Bd., 277 N.L.R.B. No. 18, 121 L.R.R.M. (BNA) 1050 (Dec. 17, 1985) (§ 8(b)(1)(A) and (2) enforcement of unlawful seniority provision).	Deferred.
Anderson Sand & Gravel Co., 277 N.L.R.B. No. 127, 121 L.R.R.M. (BNA) 1069 (Dec. 23, 1985) (§ 8(a)(3) discharge for unauthorized walkouts).	Deferred.
Wheeling-Pittsburgh Steel Corp., 277 N.L.R.B. No. 160, 121 L.R.R.M. (BNA) 1101 (Dec. 31, 1985) (§ 8(a)(1) discharge for protected concerted activity).	Not deferred. Arbitration failed *Olin* test of adequate consideration
Drummond Coal Co., 277 N.L.R.B. No. 177, 121 L.R.R.M. (BNA) 1140 (Jan. 13, 1986) (§ 8(a)(5) refusal to bargain over plant closing decision and § 8(a)(5) refusal to bargain over plant closing effects).	Not deferred. Procedural obstacles led to dismissal of grievance.

Browne., 278 N.L.R.B. No. 17, 121 L.R.R.M. (BNA) 1121 (Jan. 21, 1986) (§ 8(a)(3) discriminatory compensation and discharge because of nonunion status).	Deferred.
Earl C. Smith, Inc., 278 N.L.R.B. No. 100, 121 L.R.R.M. (BNA) 1255 (Feb. 21, 1986) (§ 8(a)(5) unilateral change in wages).	Not deferred. Repugnant, since arbitral remedy was inadequate to cure statutory violations.
Ryder/P.I.E. Nationwide, Inc., 278 N.L.R.B. No. 109, 122 L.R.R.M. (BNA) 1264 (Feb. 25, 1986) (§ 8(a)(3) discrimatory discharge).	Not deferred. Arbitration failed *Olin* test of adequate consideration.
Sachs Elec. Co., 278 N.L.R.B. No. 121, 121 L.R.R.M. (BNA) 1269 (Feb. 28, 1986) (§ 8(a)(1) discharge for protected activity).	Deferred.
Trustees of Columbia Univ., 279 N.L.R.B. No. 19, 122 L.R.R.M. (BNA) 1009 (Mar. 31, 1986) (§ 8(a)(5) unilateral change by discontinuing the tuition exemption benefit).	Deferred.
Ryder/P.I.E. Nationwide, Inc., 279 N.L.R.B. No. 28, 122 L.R.R.M. (BNA) 1048 (Apr. 9, 1986) (§ 8(a)(4) retaliation).	Not deferred. Inappropriate in § 8(a)(4) case.
Texaco, Inc., 279 N.L.R.B. No. 163, 122 L.R.R.M. (BNA) 1129 (May 30, 1986) (§ 8(a)(3) discharge for strike misconduct).	Deferred.
Armour & Co., 280 N.L.R.B. No. 96, 123 L.R.R.M. (BNA) 1266 (June 24, 1986)	Not deferred. Arbitration failed *Olin* test of adequate consideration.

(§ 8(a)(5) refusal to bargain and unilateral change).	
Carolina Freight Carriers Corp., 281 N.L.R.B. No. 69, 123 L.R.R.M. (BNA) 1342 (Sept. 10, 1986) (§ 8(a)(1) warning for protected concerted activity).	Deferred.
Toyota of San Francisco, 280 N.L.R.B. No. 93, 124 L.R.R.M. (BNA) 1056 (June 24, 1986) (§ 8(a)(5) unilateral changes to last contract offer).	Not deferred. This particular charge was not before the arbitrator.
Aces Mechanical Corp., 282 N.L.R.B. No. 137, 124 L.R.R.M. (BNA) 1145 (Feb. 3, 1987) (§ 8(a)(3) refusal to reinstate union steward because of grievance filing activity).	Not deferred. Arbitration failed *Olin* test of adequate consideration.